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No. 94-___

In The

Supreme Court of the United States

October Term, 1994

S1 AND S2, *ET AL.*,

Petitioners,

v.

STATE BOARD OF EDUCATION OF NORTH CAROLINA, *ET AL.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, following the dismissal of their lawsuit brought under 42 U.S.C. 1983, petitioners qualified as "prevailing parties" entitled to an award of attorneys' fees under 42 U.S.C. 1988, where the suit was the "catalyst" for a change in state law that provided them with the relief they sought.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in this Court and before the court of appeals when it rendered the judgment that is sought to be reviewed are: petitioners S1 and S2, who were 10-year-old children with disabilities at the time this action was filed in district court on August 2, 1985; petitioners P1 and P2, their parents; respondent Barbara Tapscott, the appointed chairman of respondent North Carolina State Board of Education, and the successor to C.D. Spangler, Jr. who was the chairman at the time of filing of the complaint; respondent State Board of Education of North Carolina.

The parties to the proceedings before the district court and the court of appeals in its previous decision in this case included petitioners and respondent North Carolina State Board of Education as well as: the Asheboro City Board of Education; C.D. Heidgerd, a hearing officer employed by the city board; and C.D. Spangler, Jr. who was the chairman of the State Board of Education at the time of filing of the complaint.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners S1 and S2, by and through their parents and guardians *ad litem*, P1 and P2, and P1 and P2 individually, petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, entered in the above-entitled proceeding on April 4, 1994.

OPINIONS BELOW

The opinion and judgment of the court of appeals, sitting *en banc*, is reported at 21 F.3d 49. App., *infra*, 1a-6a.

The opinion and judgment of the panel of the court of appeals, which was reversed by the court sitting *en banc*, is reported at 6 F.3d 160. App., *infra*, 7a-38a. The order and memorandum opinion of the United States District Court for the Middle District of North Carolina awarding attorneys' fees to petitioners, entered on March 30, 1992 (App., *infra*, 39a-48a), is unpublished. The earlier opinion and judgment of the court of appeals is reported at 832 F.2d 294. The opinion and judgment of the district court, which was vacated by the court of appeals, is reported at 650 F. Supp. 1427.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1994. On June 7, 1994, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including August 2, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

STATUTORY PROVISIONS INVOLVED

The following statutory sections are reprinted in the Appendix to this petition at 55a-58a: 42 U.S.C. 1988; N.C. Gen. Stat. Sections 115C-116 (d), (h), (i), and (j) (as amended, 1988) and Sections 115C-116 (d), (h) and (j) (as amended, 1990).

STATEMENT OF THE CASE

1. Petitioners S1 and S2 are disabled children of P1 and P2, their parents and guardians. Petitioners seek reversal of the court of appeals' *en banc* decision that they are not "prevailing parties" in their action under 42 U.S.C. 1983 against respondents North Carolina Board of Education and its chairman, and thus are not entitled to attorneys' fees against respondents under 42 U.S.C. 1988.

When this action began, petitioners S1 and S2 were enrolled in the Asheboro, North Carolina city schools. P1 and P2 enrolled their children in private schools with special programs for the disabled for the 1983-1984 school year. In subsequent years, however, the parents demanded that the school district provide a free, appropriate, individualized educational program for their children as required by the Individuals with Disabilities Education Act, 20 U.S.C. 1400, *et seq.*, formerly known as the Education of the Handicapped Act, and the Education for All Handicapped Children Act. The parents also requested tuition reimbursement from the city school authorities for the 1983-1984 school year, claiming that the school district violated the IDEA by failing to notify them of their children's right to a publicly funded education for that period. App., *infra*, 9a.

Although the children were soon placed in an appropriate public school program designed to meet their educational needs, the parents' claim for tuition reimbursement was refused. Petitioners then demanded a "due process hearing" from local school authorities, as provided under N.C. Gen. Stat. Section 115C-116, which was enacted pursuant to 20 U.S.C. 1415(b) of the IDEA. The hearing officer refused to

hear the parents' claim on the ground that he lacked authority to award tuition reimbursement under the version of Section 115C-116 in force at that time. The state education agency denied the parents' petition to amend state regulations to confer authority upon the hearing officer to make a binding award of reimbursement to remedy the local school board's violation of federal law. App., *infra*, 9a-10a.

2. Petitioners then filed suit under 42 U.S.C. 1983 in federal district court against the city board of education, the local hearing officer, the state board of education, and the state chairman of the board. They alleged that the local hearing officer, in refusing to hear their claim for tuition reimbursement, and the state board, in refusing to amend or reinterpret state procedures to allow an award of tuition reimbursement by officers authorized to hear parents' claims, had violated petitioners' procedural rights under the IDEA and its implementing federal regulations. App., *infra*, 10a-11a. Petitioners sought to recover their 1983-1984 tuition expenses, or, in the alternative, "a declaration that the state rules preventing hearing officers from deciding tuition reimbursement claims violated the parents' rights under federal law, an order enjoining [the state chairman] and the state board from promulgating and enforcing those rules, and an order compelling the city board and its hearing officer to conduct a hearing on [their] reimbursement claim." They also sought costs and attorneys' fees under 42 U.S.C. 1988, 20 U.S.C. 1415(e), and 29 U.S.C. 794a. App., *infra*, 11a.

Based on its interpretation of the IDEA as requiring States to provide an administrative hearing at which parents could obtain relief in the form of tuition reimbursement, the district court granted petitioners' motion for summary judgment on the claims for injunctive and declaratory relief. *S1 ex rel. P1 v. Spangler*, 650 F. Supp. 1427 (M.D.N.C. 1986). It ordered the city board and its hearing officer to conduct a hearing on petitioners' claims for reimbursement and to award relief if appropriate. It also enjoined the state board and its chairman from applying North Carolina law to bar the award of reimbursement in hearings on claims under the IDEA. App., *infra*, 11a.

3. Respondents appealed to the Fourth Circuit. On June 17, 1987, while the appeal was pending, the Office of Special Education and Rehabilitative Services (OSERS) of the United States Department of Education (DOE), which supervises federal grants-in-aid under the IDEA, issued a Letter Ruling in which it specifically endorsed the position taken by the district court in this case. In the ruling, OSERS agreed with the court that the IDEA requires states to authorize hearing officers to order tuition reimbursement as a remedy for violations of the statute. App., *infra*, 12a; see also *id.* at 49a-54a.

4. Shortly thereafter, petitioners agreed to a settlement with the city board of education under which the board agreed to pay petitioners' accrued tuition expenses and its assessed portion of attorneys' fees in exchange for petitioners' agreeing to dismiss all claims against the city board and city officials with prejudice. The state board and chairman were not parties to the agreement. See App., *infra*, 11a-12a; *id.* at 46a n.5.

Following the settlement, the court of appeals dismissed petitioners' remaining claims against the state respondents. *S1 ex rel. P1 v. Spangler*, 832 F.2d 294 (4th Cir. 1987). Although the court declined to decide whether petitioners' settlement with the city board rendered the case moot as against the state defendants "in strict constitutional case or controversy terms," it concluded that it nonetheless "should treat [the] appeal as moot for prudential reasons." 832 F.2d at 297. The court explained that because they had received full reimbursement on their claims for tuition, petitioners no longer had a "present need" for an injunction authorizing state hearing officers to decide their tuition claims. *Ibid.*

The court acknowledged the possibility that petitioners, who continued to use the city's educational services, might yet take advantage of a change in state mandated procedures to obtain redress for claimed violations of the IDEA in the future. It believed, however, that that prospect was not "sufficiently realistic" to warrant the issuance of an injunction. The court also noted that its refusal to rule on the request for injunctive relief against the State would allow it to avoid deciding the difficult constitutional question of whether the Eleventh Amendment would permit the court to enjoin the processes of a state administrative agency. Finally, the court expressed the belief that a ruling on the matter would soon become unnecessary because it was likely that the State of North Carolina would alter its hearing procedures in response to the opinion expressed in the OSERS' June 17, 1987, letter ruling. 832 F.2d at 297-298. Thus, the court vacated the district court's order and remanded with directions to consider petitioners' request for attorneys' fees and to

dismiss the remainder of the action as moot. *Id.* at 298-299. See *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

5. In 1988, following the court of appeals' dismissal of petitioners' action, the North Carolina General Assembly enacted amendments to Section 115C-116 that expressly authorized hearing officers to conduct hearings regarding reimbursements for violations of federal law, but retained to the state board of education, rather than to hearing officers, the authority to make reimbursement decisions final. See App., *infra*, 57a-58a; see also *id.* at 13a. OSERS objected to the revised statute and threatened to withdraw $5 million in federal education funds if the State did not comply with the requirements of the IDEA by June 30, 1990. *Ibid.* In July 1990, the North Carolina State General Assembly finally revised Section 115C-116 to grant administrative hearing officers the authority to make binding findings of fact and conclusions of law regarding violations of the IDEA. Those decisions were enforceable by the state board through the award of appropriate monetary relief, including reimbursement for tuition. App., *infra*, 13a. See also N.C. Gen. Stat. 115C-116(h), (j) (1990), App., *infra*, 55a-56a.

6. Following this legislative development, the district court awarded attorneys' fees under 42 U.S.C. 1988 and 20 U.S.C. 1415(e) against the state respondents in the amount of $30,143.18. App., *infra*, 4a, 48a. The court based the award on its finding that petitioners' lawsuit led to "federal pressure" being brought to bear on North Carolina, which in turn resulted in the amendment of Section 115C-116 to comply with federal law. App., *infra*, 13a-14a; see also *id.* at 44a-45a.

7. On appeal, a panel of the court of appeals, with Judge Wilkinson dissenting, affirmed the attorneys' fees award. App., *infra*, 7a-38a. The panel majority rejected the state's contention that "post-mootness events never can serve to establish § 1983 plaintiffs as prevailing parties for § 1988 attorney fee award purposes." The court reasoned that, in contrast with *Rhodes v. Stewart*, 488 U.S. 1 (1988), this case was not one in which "the mooting events made it impossible for the plaintiffs to prevail in the most basic sense of realizing any of the benefits sought in the action." App., *infra*, 14a. The court found that petitioners qualified as prevailing parties because their lawsuit, although not resulting in a formal judgment in their favor on the merits, had "influenced the OSERS Letter Ruling and thereby its policy in a significant way," which in turn had prompted the State to bring about the change in its hearing procedures that petitioners desired. App., *infra*, 16a-17a.

The court of appeals also rejected the state's reliance on a passage in the recently decided case of *Farrar v. Hobby*, 113 S. Ct. 566 (1992). There, this Court stated in dictum that, to qualify as a prevailing party, a civil rights plaintiff "must obtain an enforceable judgment against the defendant from whom fees are sought * * * or comparable relief through a consent decree or settlement." 113 S.Ct. at 573. The court of appeals concluded that the *Farrar* dictum should not be read as "reject[ing] the catalyst theory of prevailing party status," explaining that the validity of that theory was not at issue in the case, and that *Farrar* had relied on several prior decisions that "had

either expressly or tacitly recognized the catalyst theory's viability." App., *infra*, 23a; *id.* at 20a-24a.[1]

In his dissent, Judge Wilkinson asserted that the panel majority's decision embracing "a broad 'catalyst theory' of attorneys' fees recovery" could not be reconciled with this Court's statements in *Farrar*. App., *infra*, 27a-28a. Judge Wilkinson also stated that the catalyst theory of fee recovery "conflicts with the plain language of § 1988 itself," because individuals "must prevail in their status as parties, not in their role as agents of reform." *Id.* at 31a-32a. In Judge Wilkinson's view, this Court's cases should be interpreted as requiring that, to prevail for § 1988 purposes, parties must "succeed on the merits of a claim." That is because the lawsuit must "materially alter the legal relationship between plaintiffs and defendants," *ibid.* (quoting *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-793 (1989)), and such an alteration is not possible unless "the plaintiff

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[1] The panel majority put forward an alternative basis for awarding attorneys' fees to petitioners: that a vacatur of a favorable judgment following a dismissal on appeal for prudential mootness should not affect a plaintiff's entitlement to attorneys' fees as a prevailing party. The court relied on cases decided by other courts in which plaintiffs were awarded fees after a preliminary injunction was vacated as moot when the defendant's voluntary compliance afforded the plaintiff the sought-after relief. App., *infra*, 25a n.3. See, *e.g.*, *Maloney v. Marietta*, 822 F.2d 1023 (11th Cir. 1987); *Williams v. Alioto*, 625 F.2d 845 (9th Cir. 1980), cert. denied, 450 U.S. 1012 (1981). In those cases as in this one, the panel majority noted, the court's order was not reversed on the merits; thus, the vacatur here should not be regarded as barring an award of attorneys' fees.

becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." App., *infra*, 32a (quoting *Farrar*, 113 S. Ct. at 574). Judge Wilkinson further explained that, by permitting voluntary remedial action to be the basis of attorneys' fees awards, application of the doctrine would have the effect of discouraging such action on the part of public officials. App., *infra*, 35a-36a. Judge Wilkinson found unpersuasive decisions of other courts of appeals that had reaffirmed the catalyst theory following the Court's decision in *Farrar*, concluding that those cases "do not come to terms with the inconsistency between *Farrar* and the catalyst theory." See App., *infra*, 28a n.2 (citing *Paris v. HUD*, 988 F.2d 236 (1st Cir. 1993) and *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255 (6th Cir. 1993)).

8. On October 21, 1993, the Fourth Circuit granted the state respondents' petition for rehearing *en banc*. App., *infra*, 5a. In a per curiam opinion, a majority of seven judges of the court, with six judges dissenting, reversed the decision of the panel majority and vacated the district court's award of attorneys' fees to petitioners. The court adopted in full the dissenting panel opinion of Judge Wilkinson. It briefly reiterated the conclusions of that opinion that 1) a person cannot be a "prevailing party" under 42 U.S.C. § 1988 without having obtained "an enforceable judgment, consent, decree, or settlement giving some of the legal relief sought," and that 2) following the decision in *Farrar*, a lawsuit's role as a catalyst for extra-judicial changes in a defendant's conduct "cannot suffice to establish [a] plaintiff as a prevailing party." App., *infra*, 5a.

Six judges dissented, endorsing the view expressed in Judge Phillips' majority opinion for the panel and adopting that opinion as their own. App., *infra*, 6a.

REASONS FOR GRANTING THE PETITION

In overturning the district court's award of attorneys' fees in this case, the Fourth Circuit, sitting *en banc*, adopted an interpretation of 42 U.S.C. 1988 that dramatically narrows the grounds for fee awards to plaintiffs seeking to vindicate federal civil rights. The Fourth Circuit's categorical rejection of the well-established and widely-accepted "catalyst" theory under Section 1988 represents a misreading of the language of the statute, is contrary to legislative history that directly addresses the question, and conflicts with the interpretation of that provision by every other court of appeals to consider the issue. Moreover, there is nothing in this Court's cases, including its recent decision in *Farrar v. Hobby*, 113 S. Ct. 566 (1992), that warrants the Fourth Circuit's restrictive view of the scope of the term "prevailing party" in Section 1988.

Resolution of the conflict in the courts of appeals on the question presented by this case is of great importance to the application of Section 1988 as well as other federal statutes that permit the award of attorneys' fees to "prevailing parties." It is not uncommon for plaintiffs, as a result of a lawsuit, to benefit from a defendant's cessation of challenged conduct or a legislative reaction mandating such a change. The court of appeals ruled, however, that a plaintiff can qualify as a "prevailing party" only if his

lawsuit results in a formal judgment or settlement in his favor. Thus, attorneys' fees are not available if, in response to the plaintiff's legal challenge, the defendant voluntarily alters his conduct or takes other action to remedy the claimed violations, where that action is not mandated by judicial order or decree. Adoption of the Fourth Circuit's rule to bar an award of fees in such circumstances would significantly circumscribe the availability of attorneys' fees under federal fee shifting statutes, and would contravene Congress's intent by depriving many deserving litigants of fees despite their success in vindicating federal civil rights as a direct result of legal action.

1. The court of appeals sitting *en banc*, in adopting Judge Wilkinson's dissenting panel opinion, decided that the catalyst theory of fee recovery "conflicts with the plain language of § 1988 itself." According to Judge Wilkinson, a "prevailing party," must achieve success by virtue of "a court's authority," and not by any other means.

Judge Wilkinson's restrictive view is not the best reading of Section 1988. A party "prevails" in a lawsuit if it obtains the requested remedy as a result of prosecuting its claim. As other courts of appeals have recognized, once the conditions of causation and substantial benefit to the plaintiff are satisfied, there is no need for the additional requirement that there be a favorable judgment in the case, or that the change in conduct or law be judicially mandated or formalized by judicial decree. In *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792 (1989), the Court stated that, for attorneys' fees to be available under Section 1988, a lawsuit must

materially alter the "legal relationship" between plaintiffs and defendants. The Fourth Circuit's unduly restrictive construction of the language of Section 1988 ignores the fact that a change in the "legal relationship" between the parties to a lawsuit can be brought about by a number of means that do not require a court judgment or order – including a legislative enactment, a change in administrative practice or rules, or the implementation of an announced intent to cease or alter the objectionable conduct. The lawsuit in this case altered the "legal relationship" between petitioners and respondents, despite the absence of a formal judgment in petitioners' favor, because it resulted in a change in the procedures that the state respondents must accord petitioners when challenging school authorities' compliance with the IDEA.

This Court has in a number of cases implicitly or explicitly endorsed the "catalyst theory" of attorneys' fees awards by recognizing that a favorable final judgment is not a necessary prerequisite to achieving the status of a "prevailing party."

In *Hewitt v. Helms*, 482 U.S. 755, 761 (1986), the Court expressly acknowledged a "catalyst theory" of attorneys' fee recovery (referred to in that case as the "equivalency" doctrine) as a basis for prevailing party status. The court explained that

> in civil litigation, the judicial decree is not the ends but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces * * * [– that is,] the settling of some dispute *which affects the behavior of the*

> *defendant towards the plaintiff.* * * * If the defendant, under the pressure of the lawsuit, pays over a money claim before the judicial judgment is pronounced, the plaintiff has "prevailed" in his suit, because he has obtained the substance of what he sought. Likewise in a declaratory judgment action: if the defendant, under pressure of the lawsuit, alters his conduct (or threatened conduct) towards the plaintiff that was the basis for the suit, the plaintiff will have prevailed.[2]

Similarly, in *Maher v. Gagne*, 448 U.S. 122, 129 (1980), the Court stated that "[n]othing in the language of § 1988

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[2] Nevertheless, this case is unlike *Hewitt v. Helms*, 482 U.S. 755, 763 (1987), and *Rhodes v. Stewart*, 488 U.S. 1, 3-4 (1988) (per curiam), in which the plaintiffs were denied attorneys' fees in actions seeking injunctions against prison policies because they were no longer in custody and thus could not reap any benefit from changes in those policies. Cf. App., *infra*, 14a (panel opinion distinguishing *Rhodes v. Stewart*). In particular, petitioners' situation differs from that of the petitioner in *Hewitt v. Helms*, in which the Court held that a former prisoner who had been released on parole could not take advantage of the "catalyst" theory to achieve prevailing party status because the change in prison rules that allegedly was prompted by his lawsuit did not provide him with any redress. See 482 U.S. at 763-764. In contrast, there is no question that petitioners in this case received a concrete benefit – over and above the tuition reimbursement from the city board – from the change in hearing procedures brought about by the revision in state law. Since petitioners S1 and S2 continued to be entitled to receive a free appropriate public education as mandated by the IDEA, the right to seek relief in the form of tuition reimbursement for any future violations of federal law by the local school district was of continuing value to them.

conditions the [court's] power to award fees on full litigation of the issues or on a judicial determination that the plaintiff's rights have been violated." The Court in that case expressly rejected the view that a settlement – without a judgment on the merits – is insufficient to accord "prevailing party" status under Section 1988. In so deciding, the Court quoted from a passage in the Senate Report accompanying the enactment of Section 1988, which stated that "for purposes of the award of counsel fees, parties may be considered to have prevailed when they vindicate rights through a consent judgment or without formally obtaining relief." *Id.* at 129, quoting S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5 (1976). See also *Hanrahan v. Hampton*, 446 U.S. 754, 756-757 (1979) (per curiam) (recognizing, in reliance on the legislative reports, that a person may "in some circumstances be a 'prevailing party' " if his rights are vindicated "without formally obtaining relief."); *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) ("Plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit.").

The House Report on the federal attorneys' fees statute is even more explicit on the issue central to this case, stating that:

> [t]he phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. * * * If the litigation terminates by consent decree, for example, it would be proper to award counsel fees [citations omitted]. A "prevailing party" should not be penalized for seeking an out-of-court settlement, thus helping to

> lessen docket congestion. Similarly, after a complaint is filed *a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity that no formal relief, such as an injunction, is needed.*

H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 7 (1976) (emphasis added). The House Report thus explicitly endorses treating cases in which a defendant's "voluntary compliance" affords plaintiffs the requested remedy no differently than cases in which plaintiffs obtain relief through judicial action in the form of a favorable judgment on the merits, a settlement, or a consent decree. According to the Fourth Circuit, however, these cases should be treated differently: although fees are available in the event of a formal settlement or consent decree, they would be barred if a lawsuit terminates because of a defendant's voluntary compliance with the plaintiff's plea for relief. See App., *infra*, 35a-36a (Judge Wilkinson, dissenting) (rejecting the "catalyst theory" because it "expressly recognizes 'voluntary actions taken by a defendant' as a proper basis for a fee award."). As the unequivocal statements in the House Report make clear, however, the statute was never intended to be interpreted in this manner.

The Court's decision in *Farrar v. Hobby, supra*, is not to the contrary. The Court in that case did not consider or rule on the validity of the "catalyst" theory in the context of an extrajudicial change in the defendant's conduct that afforded the plaintiffs relief. Rather, the issue in *Farrar* was whether a fee award of $280,000 to a plaintiff who had won only a dollar in a suit seeking $17 million was

reasonable given the plaintiff's nominal success. In the course of a general discussion of Section 1988's requirements, the Court stated that, to be a prevailing party, a plaintiff "must obtain at least some relief on the merits of his claim." 113 S. Ct. at 573. The Court explained that a plaintiff must obtain an "enforceable judgment against the defendant," or "comparable relief through a consent decree or settlement," and went on to state that "a plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Ibid.*

These comments should not be construed as ruling out the award of attorneys' fees when relief is obtained by methods other than judicial decree. Although *Farrar* states that prevailing party status may be achieved by a judgment on the merits or through settlement or a consent decree, the context indicates that the list need not be exhaustive. The Court put forward a more general formulation, gleaned from its prior attorneys' fees cases, that would allow an award in the absence of a formal judgment: that fees can be appropriate where the relief obtained "alters the legal relationship between the parties * * * in a way that directly benefits the plaintiff." 113 S. Ct. at 573. In any event, *Farrar* did not claim to decide whether a party could "prevail" without a favorable judgment on the merits (since the plaintiff in that case had obtained such a judgment), and did not discuss the legislative history or analyze other pertinent materials bearing on the proper resolution of that particular issue. Thus, the decision in *Farrar* cannot fairly be read as

definitively foreclosing the catalyst theory of fee recovery.

2. a. Application of the "catalyst" theory to determine whether a party seeking attorneys' fees is a "prevailing party" is a firmly entrenched doctrine that has been recognized by every court of appeals, including the Fourth Circuit, prior to the decision in this case.[3] In addition, the court of appeals' decision here is in direct conflict with post-*Farrar* decisions in four other courts of appeals that have continued to apply the catalyst theory to uphold awards of attorneys' fees to plaintiffs who, by dint of filing a lawsuit under Section 1983, have obtained some sought-after relief without a final judgment in their favor. See *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541 (3d Cir. 1994); *Paris v. HUD*, 988 F.2d 236 (1st Cir. 1993); *Watkins v. Fordice*, 7 F.3d 453 (5th Cir. 1993); *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255 (6th Cir. 1993). In addition, another court of appeals has endorsed the "catalyst" theory following *Farrar*, but denied attorneys' fees for reasons unrelated to the validity of the theory. See *American Council of the Blind v.*

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[3] See, *e.g.*, *Public Citizen Health Research Group v. Young*, 909 F.2d 546 (D.C. Cir. 1990); *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978); *Gerena-Valentine v. Koch*, 739 F.2d 755 (2d Cir. 1984); *Wheeler v. Towanda Area Sch. Dist.*, 950 F.2d 128 (3d Cir. 1991); *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979); *DeMier v. Gondles*, 676 F.2d 92 (1982); *Garcia v. Guerra*, 744 F.2d 1159 (5th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); *Perket v. Sec'y of HHS*, 905 F.2d 129 (6th Cir. 1990); *Dawson v. Pastrick*, 600 F.2d 70 (7th Cir. 1979); *Truax v. Bowen*, 842 F.2d 995 (8th Cir. 1988); *Lads Trucking Co. v. Bd. of Trustees*, 777 F.2d 1371 (9th Cir. 1985); *Luethje v. Peavine Sch. Dist.*, 872 F.2d 352 (10th Cir. 1989); *Martin v. Heckler*, 773 F.2d 1145 (11th Cir. 1985).

Romer, 992 F.2d 249 (10th Cir. 1993), cert. denied, 114 S. Ct. 184 (1993); see also *Craig v. Gregg County, Texas*, 988 F.2d 18 (5th Cir. 1993).[4]

In *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d at 546-548, a group of public housing tenants sued the local housing authority claiming that a plan for renovating certain public housing facilities violated federal housing statutes. While the lawsuit was pending, the local authority revised its renovation plan with the tenants' approval, after which the district court dismissed the case on the plaintiffs' motion. In reversing the district court's denial of attorneys' fees, the court of appeals applied a two-part test for prevailing party status: "whether plaintiffs achieved some of the benefit sought in the lawsuit, even though the plaintiff does not ultimately succeed in securing a favorable judgment," and

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[4] In *American Council of the Blind*, a charitable organization challenged a Colorado statute regulating solicitation by charities in the State. Before the court could rule on the merits of the suit, the Colorado legislature passed amendments changing some of the requirements in the statute, and the lawsuit was eventually dismissed by agreement of the parties. The court of appeals upheld a denial of attorneys' fees based on the district court's finding that the lawsuit did not prompt the statutory changes and that, in any event, those changes did not "materially alter" the specific statutory provisions to which the plaintiffs had objected in their lawsuit. 992 F.2d at 251.

Craig concerned a challenge under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, to a county districting plan. The districting plan was subsequently revised in response to objections by the Department of Justice. Although embracing the "catalyst" analysis, the court of appeals denied attorneys' fees because there was no evidence that the county revised its redistricting plan in response to the plaintiffs' lawsuit. 988 F.2d at 21.

whether "there is a causal connection between the litigation and the relief from the defendant." 21 F.3d at 546 (quoting *Wheeler v. Towanda Area Sch. Dist.*, 950 F.2d 128, 131 (3d Cir. 1991)). The court expressly rejected the claim that this Court's decision in *Farrar* abrogated the "catalyst" theory as a basis for awarding fees under Section 1988. 21 F.3d at 547-548. Similarly, in *Watkins v. Fordice*, 7 F.3d at 456-457, the Fifth Circuit upheld an award of attorneys' fees to plaintiffs who had filed suit seeking to enjoin elections in Mississippi under the federal Voting Rights Act. Before the court could act on the claim, the state legislature passed a new redistricting plan that satisfied the plaintiffs' demands for the maximum number of electable black majority districts, which mooted the plaintiffs' claims. Although there was no final judgment favorable to plaintiffs, the court of appeals ruled that they qualified as prevailing parties because "the goals of the lawsuit were achieved" and plaintiffs' lawsuit was found by the district court to be a "motivating factor" in the enactment of the new redistricting plans. 7 F.3d at 456-457.

The plaintiffs in *Paris v. HUD*, 988 F.2d at 237, filed suit claiming that an income mixing scheme for allocating units in a public housing project violated federal housing statutes and the Constitution. While the lawsuit was pending, Congress passed a statute prohibiting the type of income mixing scheme used by HUD, and specifically referred to the *Paris* litigation in explaining the need for the statute. HUD then voluntarily abandoned the income mixing scheme at issue in the case to conform to the statutory mandate, and the district court dismissed the suit. The First Circuit reversed the district court's denial of attorneys' fees under Section 1988. It explained that, despite the absence of a final judgment in their favor,

plaintiffs qualified as "prevailing parties" in that their lawsuit could be "fairly characterized as a catalyst" of the Congressional amendment that led to the abandonment of the income mixing scheme challenged in their suit. 988 F.2d at 241.

Finally, in *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d at 257-258, an association of property owners filed suit under 42 U.S.C. 1983, claiming that a school board's policy requiring prior approval for persons to speak at board meetings violated the First Amendment. While the case was pending the board revised its policy, and the court subsequently dismissed the case as moot. The court of appeals held that an award of attorneys' fees under Section 1988 was appropriate because the plaintiffs' suit had brought about a revision in the school board's policy, and the plaintiffs had materially benefitted from the change. 985 F.2d at 257-258.

b. In *Paris*, *Baumgartner*, *Watkins*, and *Citizens Against Tax Waste*, legislative action or the defendants' voluntary change in conduct brought plaintiffs the benefits sought in their lawsuit, and led to the dismissal of their court action before final judgment could be rendered. In this case, petitioners' suit against the state respondents was dismissed on grounds of prudential mootness prior to the legislative changes that brought petitioners the requested relief. As Judge Wilkinson himself concedes, App., *infra*, 28a n.2, the factual differences among these cases is without significance to the fundamental question they present, on which the Fourth Circuit is at odds with her sister circuits. Under the standard articulated by Judge Wilkinson and the *en banc* majority

in adopting his opinion, the plaintiffs in *Paris*, *Baumgartner*, *Watkins*, and *Citizens Against Tax Waste*, would not be entitled to attorneys' fees because none of them had obtained a formal settlement, consent decree, or final judgment in their favor.[5] Likewise, there is no doubt that the award of attorneys' fees to petitioners would have been upheld in the four circuits discussed above, since petitioners fulfilled all the requirements for attorneys' fees as set forth in those cases. See, *e.g.*, *Watkins*, 7 F.3d at 456; *Baumgartner*, 21 F.3d at 547; *Citizens Against Tax*

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[5] Judge Wilkinson expressed a willingness to distinguish three "voluntary compliance" cases cited by the panel majority, see App., *infra*, 30a-31a n.3, in which the plaintiffs succeeded in obtaining a preliminary injunction based on the probability of success on the merits, which injunction was subsequently dissolved after the defendants complied by ceasing the unlawful conduct. See App., *infra*, 25a n.3 (citing *Maloney v. Marietta*, 822 F.2d 1023 (11th Cir. 1987); *Taylor v. Ft. Lauderdale*, 810 F.2d 1551 (11th Cir. 1987); *Williams v. Alioto*, 625 F.2d 845 (9th Cir. 1980), cert. denied, 450 U.S. 1012 (1981)). Judge Wilkinson suggested that an award of attorneys' fees in those cases might be appropriate on the theory that the dissolution of an injunction – where that injunction was based on a determination that the defendant had engaged in unlawful conduct – would not deprive the plaintiffs of prevailing party status. He refused to accept the panel majority's contention, however, (App., *infra*, 30a-31a n.3 and note 1, *supra*) that the instant case, in which a favorable district court decision had been vacated as moot, should receive analogous treatment. Based on Judge Wilkinson's discussion, there is no reason to believe that the *en banc* majority would extend prevailing party status to the plaintiffs in *Paris*, *Baumgartner*, *Watkins*, and *Citizens Against Tax Waste*, who had never obtained a preliminary injunction or any other ruling in their favor.

Waste, 985 F.2d at 257-258; *Paris*, 988 F.2d at 241.[6] First, petitioners achieved the goals of their lawsuit against the state respondents, and the legal action was a "significant catalyst" in bringing about the requested change in state law and in respondents' conduct. The district court made a factual finding of a "distinct causal connection between the harm [petitioners] sought to rectify by bringing suit and the ultimate revision of North Carolina General Statutes 115C-116 to conform to federal law." App., *infra*, 44a. That factual finding was not found to be erroneous by the court of appeals panel, App., *infra*, 16a-18a, and, although briefly questioned by Judge Wilkinson, *id.* at 30a, ultimately was not disturbed by the *en banc* court. *Id.* at 3a-5a.

In addition, the revision in state law prompted by petitioners' suit brought about a clear change in the "legal relationship" between petitioners and the state respondents. That change provided petitioners with a concrete benefit by assuring them that they could seek a binding award of tuition reimbursement through the

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[6] As the panel opinion for the court of appeals noted, see App., *infra*, 19a-20a, petitioners' claims also satisfied the requirement, imposed by some courts of appeals, that the requested change in the defendants' conduct be "required by law," in the sense that the legal basis for the action not be "groundless or frivolous." See, *e.g.*, *Dunn v. The Florida Bar*, 889 F.2d 1010, 1015 (11th Cir. 1989), cert. denied, 498 U.S. 811 (1990); *Guglietti v. Sec'y of HHS*, 900 F.2d 397, 401 (1st Cir. 1990); *Garcia v. Guerra*, 744 F.2d 1159, 1162 (5th Cir. 1984), cert. denied, 471 U.S. 1065 (1985); see also *Paris*, 988 F.2d at 241. Here, petitioners' claims were far from frivolous; the DOE itself agreed that the state statutory change authorizing hearing officers to award reimbursement was required by the terms of the IDEA itself.

state hearing process for any violation of their rights under the IDEA. See note 2, *supra*.

Thus, were it not for the *en banc* court's rejection of the catalyst theory, petitioners would have secured the attorneys' fees that both the district court and the Fourth Circuit panel awarded to compensate petitioners for their sustained efforts to enforce federal law over almost ten years. This Court should grant review to reconcile the conflicting views of the courts of appeals and to resolve the important question of whether a plaintiff can recover attorneys' fees when a lawsuit is the "catalyst" for the relief the plaintiff seeks.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

S-1 AND S-2, By and Through their parents and Guardians Ad Litem, P-1 AND P-2; P-1 and P-2, Individually, Plaintiffs-Appellees,

v.

The STATE BOARD OF EDUCATION OF NORTH CAROLINA; Barbara Tapscott, Chairman, State Board of Education of North Carolina, Defendants-Appellants,

and

C.D. Heidgerd, Hearing Officer, Asheboro City Board of Education; The Asheboro City Board of Education; Mary Smitherman, Defendants.

No. 92-1525.

United States Court of Appeals,
Fourth Circuit.

Argued March 8, 1994.

Decided April 4, 1994.

Parents of handicapped students brought action under § 1983 seeking tuition reimbursement and injunctive and declaratory relief with respect to state board of education's refusal to allow hearing officers to award tuition reimbursement. The United States District Court for the Middle District of North Carolina, Frank W. Bullock, Jr., Chief Judge, 650 F.Supp. 1427, granted summary judgment for parents, and appeal was taken. The Court of Appeals, 832 F.2d 294, found that parents' settlement with city board of education mooted appeal and remanded. On remand, the District Court, awarded parents attorney fees against state board, and appeal was taken. The Court of Appeals, 6 F.3d 160 affirmed. Upon granting petition for

rehearing en banc, the Court of Appeals held that: (1) plaintiff cannot be considered prevailing party under § 1988 except by virtue of having obtained enforceable judgment, consent decree, or settlement giving some legal relief sought in § 1983 action; (2) "catalyst theory" is no longer available to establish plaintiff's status as prevailing party; and (3) dismissal of appeal on mootness grounds operated to vacate judgment below and prevented parents from being found prevailing parties by virtue of postdismissal events.

Reversed.

Ervin, Chief Judge, and K.K. Hall, Phillips, Murnaghan, Hamilton, and Michael, Circuit Judges, dissented.

ARGUED: Edwin Marion Speas, Jr., Sr. Deputy Atty. Gen., North Carolina Dept. of Justice, Raleigh, NC, for appellants. A. Frank Johns, Jr., Booth, Harrington, Johns & Campbell, Greensboro, NC, for appellees. **ON BRIEF**: Lacy H. Thornburg, Atty. Gen. of NC, North Carolina Dept. of Justice, Raleigh, NC, for appellants.

Before ERVIN, Chief Judge, and RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, WILKINSON, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, and MICHAEL, Circuit Judges, sitting en banc.

Reversed by published per curiam opinion. Judges RUSSELL, WIDENER, WILKINSON, WILKINS, NIEMEYER, LUTTIG, and WILLIAMS voted to reverse the district court. Chief Judge ERVIN and Judges K.K. HALL, PHILLIPS, MURNAGHAN, HAMILTON, and MICHAEL voted to affirm the district court.

OPINION

PER CURIAM:

Plaintiffs, parents of handicapped students enrolled in the Asheboro, North Carolina schools, filed this 42 U.S.C. § 1983 action in 1986 against the Asheboro City Board of Education, the State Board of Education of North Carolina, and the chairman of the State Board, C.D. Spangler, Jr. Plaintiffs alleged that defendants had violated the Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1400 et seq., by refusing to authorize hearing officers to decide tuition reimbursement claims and to order reimbursement in appropriate cases. Plaintiffs therefore sought tuition reimbursement and injunctive and declaratory relief. In December 1986, the district court granted plaintiffs' motion for summary judgment on their claims for declaratory and injunctive relief against all the defendants, reasoning that the EHA required that state hearing officers possess the authority to decide tuition reimbursement claims. *See S-1 v. Spangler*, 650 F.Supp. 1427 (M.D.N.C.1986).

While the appeal of the district court's ruling was pending, plaintiffs and the City Board reached a settlement agreement under which the City Board would pay the parents' tuition expenses for their children and also pay plaintiffs' attorneys' fees. The State Board and Spangler were not parties to this settlement agreement; accordingly, the parents did not dismiss any of their claims against the state defendants. Nonetheless, on appeal, a panel of this court held for prudential reasons that the settlement mooted the appeal because it gave

plaintiffs the reimbursement they sought. *See S-1 v. Spangler,* 832 F.2d 294, 296 (4th Cir.1987). This court therefore vacated the district court's summary judgment order and remanded for a determination of plaintiffs' entitlement, if any, to attorneys' fees from the state defendants. *Id.* at 298 and note 3.

After this court directed the district court to "dismiss the remainder of the action as moot," *id.* at 298, the Office of Special Education and Rehabilitative Services of the United States Department of Education ("OSERS") informed the State that federal education funds would be withdrawn if the State did not amend its law to authorize hearing officers to decide parents' reimbursement claims. Although the State had amended its special education law in 1988 to permit hearing officers to recommend tuition reimbursement decisions to the State Board, OSERS objected to the 1988 amendments on the ground that hearing officers still lacked the authority to make binding decisions regarding reimbursements. In July 1990, almost three years after plaintiffs' claims had been declared moot, the State responded to OSERS' threat by enacting legislation giving administrative law judges the authority to make binding decisions, subject to appeal, regarding a child's special education needs. *See* 1990 N.C.Sess.Laws ch. 1058 (July 28, 1990).

Shortly after North Carolina's amendment of its hearing procedure, the district court considered the propriety of awarding attorneys' fees to plaintiffs. On March 30, 1992, the district court assessed $30,143.18 in attorneys' fees against the state defendants under 20 U.S.C. § 1415(e) and 42 U.S.C. § 1988. On appeal, a panel of this court affirmed the district court's award of attorneys'

fees. *See S-1 & S-2 v. State Bd. of Educ.*, 6 F.3d 160 (4th Cir.1993). Judge Wilkinson dissented. *See S-1*, 6 F.3d at 168-72.

On October 21, 1993, the court granted the state defendants' petition for rehearing en banc. Upon a review of the record and the briefs, and following oral argument, a majority of the court voted to reverse the district court's award of attorneys' fees. The court holds the following:

1. A person may not be a "prevailing party" plaintiff under 42 U.S.C. § 1988 except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought in a § 1983 action. *Farrar v. Hobby*, ___ U.S. ___, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992).

2. The fact that a lawsuit may operate as a catalyst for post-litigation changes in a defendant's conduct cannot suffice to establish plaintiff as a prevailing party. "Catalyst theory," allowing that result, is no longer available for that purpose, *see Farrar*, ___ U.S. at ___, 113 S.Ct. at 573-74, and cases such as *Bonnes v. Long*, 599 F.2d 1316 (4th Cir.1979), which applied that theory, are overruled.

3. Here, the dismissal on appeal of an action under 42 U.S.C. § 1983 for prudential reasons as moot operates to vacate the judgment below, *see United States v. Munsingwear, Inc.*, 340 U.S. 36, 71 S.Ct. 104, 95 L.Ed. 36 (1950), and prevents the plaintiffs from being found prevailing parties by virtue of post-dismissal events. The plaintiffs therefore are not entitled to an award of attorney fees under 42 U.S.C. § 1988.

The court adopts as its own the dissenting panel opinion of Judge WILKINSON. *S-1*, 6 F.3d at 168-72. Judges RUSSELL, WIDENER, WILKINSON, WILKINS, NIEMEYER, LUTTIG, and WILLIAMS agree to the foregoing parts of this opinion and its holding to reverse the district court.

Chief Judge ERVIN and Judges HALL, PHILLIPS, MURNAGHAN, HAMILTON, and MICHAEL respectfully dissent. They would hold that the district court properly awarded attorneys' fees in this case for the reasons expressed in the majority opinion of the panel. They therefore adopt Judge PHILLIPS' majority opinion of the panel as their own and would adopt it as the opinion of the en banc court. *S-1*, 6 F.3d at 160-68.

The judgment of the district court is accordingly

REVERSED.

S-1 and S-2, By and Through their parents and Guardians Ad Litem, P-1 and P-2; P-1 and P-2, Individually, Plaintiffs-Appellees,

v.

The STATE BOARD OF EDUCATION OF NORTH CAROLINA; Barbara Tapscott, Chairman, State Board of Education of North Carolina, Defendants-Appellants,

and

C.D. Heidgerd, Hearing Officer, Asheboro City Board of Education; the Asheboro City Board of Education; Mary Smitherman, Defendants.

No. 92-1525.

United States Court of Appeals,
Fourth Circuit.

Argued Oct. 29, 1992.

Decided Sept. 21, 1993.

Rehearing En Banc Granted,
Opinion Vacated Oct. 21, 1993.

Parents of handicapped students sought tuition reimbursement and injunctive and declaratory relief with respect to state board of education's refusal to allow hearing officers to award tuition reimbursement. The United States District Court for the Middle District of North Carolina, Frank W. Bullock, Jr., Chief Judge, 650 F.Supp. 1427, granted claims, and appeal was taken. The Court of Appeals, 832 F.2d 294, found that settlement with city board of education mooted action. On remand, the parents sought attorney fee award as prevailing parties. The District Court, Bullock, Chief Judge, awarded

attorney fees to parents, and appeal was taken. The Court of Appeals, Phillips, Circuit Judge, held that postmootness events could serve to establish § 1983 plaintiffs as prevailing parties for purposes of attorney fee award.

Affirmed.

Wilkinson, Circuit Judge, filed dissenting opinion.

Edwin Marion Speas, Jr., Sr. Deputy Atty. Gen., North Carolina Dept. of Justice, Raleigh, NC, argued, (Lacy H. Thornburg, Atty. Gen. of North Carolina, on brief), for defendants-appellants.

A. Frank Johns, Jr., Booth, Harrington, Johns & Campbell, Greensboro, NC, argued, for plaintiffs-appellees.

Before ERVIN, Chief Judge, and PHILLIPS and WILKINSON, Circuit Judges.

OPINION

PHILLIPS, Circuit Judge:

The essential issue presented is whether following dismissal of an action under 42 U.S.C. § 1983 for prudential reasons as moot, the § 1983 plaintiffs may yet be found prevailing parties by virtue of post-dismissal events and therefore entitled to an award of attorney fees under 42 U.S.C. § 1988. In this appeal by the State of North Carolina from such an award, we find no error and affirm.

I

When this action began, S1 and S2 were handicapped children enrolled in the Asheboro, North Carolina city schools. In the fall of 1983, after notifying the principal at the children's public school of their intentions, their parents enrolled them at their own expense in a private school for one-half of each school day to receive special education services.

The following school year, the parents demanded that the Asheboro City Board of Education (City Board) provide the children with an individualized education program comparable to that provided at the children's private school or, alternatively, provide transportation and tuition for the children to continue at the private school for the 1984-85 school year. The parents premised their demand on the Education of Handicapped Act (EHA), which the parents claimed the City Board was violating by failing to provide their children with the "free appropriate public education" guaranteed by the Act, 20 U.S.C. § 1412(1). The parents also demanded tuition reimbursement for the 1983-84 school year, claiming that the city schools failed to notify them during that school year of their federal right to receive free special education services as required by the EHA.

The City Board eventually placed the children appropriately in the city school system, but the City Board refused the parents' tuition reimbursement claim for the 1983-84 school year and for the period during the fall of 1984 before the City Board and parents negotiated a placement. When the City Board denied their tuition

reimbursement claim, the parents demanded a "due process hearing" pursuant to N.C.Gen.Stat. § 115c-116, a statute enacted pursuant to the EHA, 20 U.S.C. § 1415(b)(2). The appointed hearing officer, however, declared that he lacked authority to award tuition reimbursement, or make findings of fact attendant to a tuition reimbursement claim, and so refused to hear the parents' complaint. The parents then petitioned the North Carolina State Board of Education (State Board) to rule either that the hearing officer had authority to hear their claim or, alternatively, to amend the State regulations enacted pursuant to the EHA to confer such authority on him. The State Board denied the parents' petition.

The parents then filed suit under 42 U.S.C. § 1983 against the City Board, the State Board and the chairman of the State Board, C.D. Spangler, Jr., alleging the deprivation of procedural rights secured by the EHA and applicable federal regulations, 34 C.F.R. § 104.31 *et seq.* Relying primarily on *School Committee of Burlington v. Department of Education*, 471 U.S. 359, 105 S.Ct. 1996, 85 L.Ed.2d 385 (1985), the parents alleged that the City Board, acting by and through its duly appointed hearing officer, had deprived them of procedural rights secured by federal law when it refused to decide their tuition reimbursement claim. The parents further alleged that the State Board and Chairman Spangler had deprived them of federally guaranteed procedural rights when it refused to interpret or amend State regulations to permit the hearing officer to decide their tuition reimbursement claim. The parents sought to recover tuition expenses from the City Board or, in the alternative, the following: a

declaration that the State rules preventing hearing officers from deciding tuition reimbursement claims violated the parents' rights under federal law, an order enjoining Spangler and the State Board from promulgating and enforcing these rules, and an order compelling the City Board and its hearing officer to conduct a hearing on this particular reimbursement claim. The parents also sought costs and attorneys' fees from all defendants, under 42 U.S.C. § 1988 and 29 U.S.C. § 794a.

On December 31, 1986, the district court granted the parents' motion for summary judgment on the claims for injunctive and declaratory relief, concluding that the EHA required a state administrative hearing at which parents could receive tuition reimbursement as appropriate relief for violations of the Act. *S-1 v. Spangler*, 650 F.Supp. 1427 (M.D.N.C.1986). On the same day, the district court issued an order directing the City Board and its administrative hearing officer to conduct a hearing on the parents' claim for reimbursement, enter findings of fact and conclusions, and, if appropriate, award reimbursement; and enjoining Spangler and the State Board from further interpreting North Carolina law in a manner inconsistent with the court's interpretation of the EHA. Spangler, the State Board, the City Board, and the administrative hearing officer appealed the district court's decision.

On September 24, 1987, while that appeal was pending, the parents and the City Board agreed to a partial settlement of the case. Under the terms of this settlement agreement, which the district court approved by order entered the same day, the parents agreed to a voluntary dismissal with prejudice of all their claims against the

City Board, in return for the City Board's agreement to pay their accrued tuition expenses. The State Board and its Chairman were not parties to the settlement agreement, and the parents did not dismiss any of their claims against them.

In light of these developments, we held for prudential reasons that the appeal was moot. In so doing, we explained that:

> We do not believe that the issues raised in this appeal require immediate resolution because they are capable of repetition yet likely to evade review. Our conclusion is based in large part on a June 17, 1987 Letter Ruling, issued after submission of this appeal by the Office of Special Education and Rehabilitative Services (OSERS) of the United States Department of Education, which has supervisory authority over federal grant-in-aid monies issued to the states under the EHA. The Letter Ruling expressly endorses the holding of the district court in this action, that the EHA requires states to authorize their hearing officers both to decide parents' tuition reimbursement claims and to order reimbursement where the conditions of *Burlington* are satisfied. Given OSERS's specific disapproval of the State Board's current procedures, we doubt that the precise conduct allegedly violative of federal procedural rights will recur; instead, we would suppose that any remaining doubt about the propriety of the current North Carolina procedures will be resolved shortly without judicial interference. We assume, for the purposes of this analysis, that the State Board and its Chairman will comply in good faith with the OSERS Letter Ruling.

S-1 & S-2 v. Spangler, 832 F.2d 294, 298 (4th Cir.1987).

We therefore vacated the order of the district court from which the state defendants had appealed, and remanded with directions to determine "whether and in what amounts attorney's fees should be recoverable against the state defendants," and "to dismiss the remainder of the action as moot." *Id.* (emphasis supplied). Our assumption about the state defendants' likely compliance with the OSERS Letter Ruling was, as it turned out, too sanguine – at least for a time. In 1988 the North Carolina General Assembly did amend Section 115c-116 to allow an administrative law judge presiding over a due process hearing to recommend a decision to the State Board. Yet the final decision remained with the Board, or with two of its members designated to make the decision. 1988 N. C. Sess. Laws ch. 1079 (July 8, 1988).

For this reason, OSERS objected to the revised statute, and threatened to withdraw some $5 million in federal education funds if the State did not comply with federal law by June 30, 1990. Through legislation specifically enacted to preserve these federal funds, the General Assembly again amended Section 115c-116 so that an administrative law judge's findings of fact and conclusions of law would become final unless appealed to the State Superintendent of Public Instruction. If there was such an appeal, the Superintendent could appoint a disinterested educator to enter final findings of fact and conclusions of law. 1990 N.C.Sess.Laws ch. 1058 (July 28, 1990).

On March 30, 1992, the district court filed a memorandum opinion and order which awarded $30,143.18 in attorneys' fees to the parents, reasoning that "by virtue of Plaintiff's complaint sufficient federal pressure was

brought to bear on the State of North Carolina that Section 115c-116 was amended to comply with federal law." The State Board now appeals this decision, arguing that actions taken after this court declared the parents' claim moot cannot serve as a basis for declaring them prevailing parties, that the amendments in question do not support such a determination, and that the OSERS letter opinion was not in response to the parents' claims and was unimportant if it was.

II

At the outset, we reject the State's apparent contention that post-mootness events never can serve to establish § 1983 plaintiffs as prevailing parties for § 1988 attorney fee award purposes. *Rhodes v. Stewart*, 488 U.S. 1, 109 S.Ct. 202, 102 L.Ed.2d 1 (1988), upon which the State relies for this position, does not support any such absolute rule. In that case, it was belatedly realized that before the district court had entered a declaratory judgment in favor of two State prison inmates claiming unconstitutional prison conditions, one had died and the other had been paroled. Because this constitutionally mooted the action, the Supreme Court, where the mooting circumstances were first realized in the course of reviewing an attorney fee award made to the two plaintiffs, held that neither could be found a prevailing party since neither could realize any benefit from the judgment on the merits. *Id.* at 3, 4, 109 S.Ct. at 202, 203.

This obviously does not stand for the proposition that once mooting of a § 1983 action occurs, the plaintiffs in the action can never be prevailing parties on the basis

of later out-of-court developments. Mooting may have that effect, as it did in *Rhodes* where the mooting events made it impossible for the plaintiffs to prevail in the most basic sense of realizing any of the benefits sought in the action. But it need not. Whether it does or not is determined by making the established causation-centered test of prevailing party status applied in such cases as *Bonnes v. Long*, 599 F.2d 1316 (4th Cir.1979) (*Bonnes I*). As formulated in that decision, the test requires an

> inquiry [that] is properly a pragmatic one of both fact and law that will ordinarily range outside the merits of the basic controversy. Its initial focus might well be on establishing the precise factual/legal condition that the fee claimant has sought to change or affect so as to gain a benefit or be relieved of a burden. With this condition taken as a benchmark, inquiry may then turn to whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition.

Id. at 1319.

In applying this test we have held that "to get a truer picture of a plaintiff's success [courts] should look outside the final judgment to voluntary actions taken by a defendant so long as those actions are causally connected to the litigation." *Spencer v. General Elec. Co.*, 894 F.2d 651, 662 (4th Cir.1990). And if the inquiry so conducted reveals that the § 1983 action acted as a catalyst for a defendant's actions ultimately favorable to the plaintiff,

the requisite causal connection may be found on that basis. *DeMier v. Gondles,* 676 F.2d 92, 93 (4th Cir.1982).

In making its determination that plaintiffs here were prevailing parties, the district court carefully and specifically applied the *Bonnes I* test as elaborated in *Spencer* and *DeMier.* In reviewing that decision, we start with deference to that court's "ringside view of the relevant conduct of the parties and of the underlying legal dispute," *Alexander v. Cheverly,* 953 F.2d 160, 162 (4th Cir.1992), and proceed on the basis that "[i]n view of the specter of satellite litigation over attorneys' fees, appellate review of lower court decisions in this area, appropriately, is limited." *Id.* at 161.

Our review reveals no error in the court's decision. The § 1983 action in behalf of S-1 and S-2 claimed that North Carolina's 1985 due process procedures violated the EAHCA in ways that deprived them of benefits to which that statutory program entitled them. The district court's December, 1986 judgment in the parents' favor provided the basis for the OSERS Letter Ruling issued in response to an inquiry respecting a similar situation in June 1987.[1] While the district court's decision may not have "prompted OSERS to issue an official policy statement" as the district court explained, it certainly shaped or at least influenced the OSERS Letter Ruling and thereby its policy in a significant way. With OSERS thus essentially adopting the parents' position and promising

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[1] The OSERS Letter Ruling was in response to the inquiry of a Vermont attorney whose clients had been denied reimbursement because the Vermont state reviewing officer had held she had no authority to grant such relief.

to enforce it, that the State would eventually provide the due process amendments the parents sought became almost a foregone conclusion.

As the parents argue and the district court implicitly recognized, the chain of causation between the § 1983 action's commencement, the district court's original decision in the parents' favor, the OSERS Letter Ruling and the State's eventual compliance with it was in no way affected by our mooting of the underlying § 1983 action for prudential reasons. Indeed, our opinion finding the action moot recognized and was in part based on the recognition that this causal chain would remain intact, and that OSERS would probably force the State to comply if it refused to do so.

The State urges that its unwillingness to make those changes the parents and OSERS sought, and the fact that it eventually made them only to preserve federal education funding, should be taken as indications that the parents' suit played no part in the State's actions. "To be pragmatic," the State argues, "a dead lawsuit has no motivational value compared to $50,000,000 (sic)." Of course, what the State refuses to acknowledge here is that the parents' lawsuit was at least partly responsible for OSERS threatening to withdraw the federal education funding.

To begin with, the parents' suit and its success in the district court must have alerted OSERS to the State's noncomplying position, perhaps focusing federal attention on the State earlier than it otherwise would have occurred. More crucially, though, the district court's opinion clearly played a major causative role in the OSERS

Letter Ruling and thereby the Department of Education's policy position. Both the timing of the district court's opinion and the text of the Letter Ruling itself confirm the opinion's import.

In responding to the initial inquiry which prompted the Letter Ruling, OSERS on November 3, 1986 indicated that since "the matter you present will require a substantial review of legislative history and case law, as well as a thorough analysis of policy implications for each of the other states," OSERS would need sixty days to provide a substantive response. On December 31, 1986, the district court handed down its opinion on precisely the issue OSERS was deciding. The Letter ruling, issued by OSERS on June 17, 1987, relied heavily on the decision by the district court. Over a third of the text of response was devoted to a discussion of this decision, and OSERS concluded that "[t]he court's reasoning in the *Spangler* decision is sound. . . . OSERS concurs with the reasoning adopted by Judge Bullock in his *Spangler* decision and shares his opinion that EHA-B requires States to authorize its hearing officers to decide reimbursement claims in an impartial due process proceeding . . . ".

Given these causal links between the parents' suit and OSERS' actions, the State's insistence that it changed position only to preserve federal funding amounts essentially to an admission that the parents' suit did significantly impact State law, achieving through OSERS pressure what it had originally and successfully sought in the district court. The State's position as now stated only underscores the fact that it would not have changed without the federal pressure, and thus would not have ameliorated its position without the parents' suit.

Finally, the State contends that even if the parents' suit was a significant causal factor in the 1988 and 1990 legislation, the legislation itself was not "required by law," and thus under *Dunn v. The Florida Bar,* 889 F.2d 1010, 1015 (11th Cir.1989), *cert. denied,* 498 U.S. 811, 111 S.Ct. 46, 112 L.Ed.2d 22 (1990), the parents were not prevailing parties for purposes of attorneys' fees. The State's argument that the legislation was not required by law is essentially that 20 U.S.C. § 1415(b)(2) provides that parents "shall have an opportunity for an impartial due process hearing" and that "[n]o hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child." The State's position is that because the Board of Education is composed of "constitutional officers" and not "employees," the provisions of § 1415(b)(2) were improperly applied and the changes the State made were not "required by law" as *Dunn* held necessary.

In *Dunn,* however, the Eleventh Circuit explained what it meant in "required by law" by referring to a pair of earlier Fifth Circuit cases. In these, the Fifth Circuit held that "appellants need only show that the action taken by the appellees was 'not a wholly gratuitous response to an action that in itself was frivolous or groundless.' (citation omitted). A claim is not frivolous if it is arguably supported by case or statutory law." *Garcia v. Guerra,* 744 F.2d 1159, 1163 (5th Cir.1984), *cert. denied,* 471 U.S. 1065, 105 S.Ct. 2139, 85 L.Ed.2d 497 (1985). "[A] plaintiff who brings an action that has no colorable, or even reasonable, likelihood of success on the merits is not entitled to recover attorney's fees if the defendant simply

complies with the plaintiff's demands and moots the case for reasons that have nothing to do with the potential merit of the suit. Whether activated by economic, political, or purely personal concerns, a defendant may choose voluntarily to make the change sought in the suit rather than undergo protracted and expensive litigation." *Hennigan v. Ouachita Parish School Bd.*, 749 F.2d 1148, 1153 (5th Cir.1985).

Clearly, the State did not voluntarily make any changes to avoid litigation in this case; and just as clearly, the changes the parents and OSERS sought and that the State made were at least "arguably supported by case or statutory law" so as not to be frivolous claims on the parents' part. Whether State Board members are "constitutional officers" or "employees" hardly seems to impinge upon their impartiality, which is the concern of § 1415(b)(2). For purposes of attorneys' fees, the State's changes were "required by law," or made in response to a colorable claim.

III

Since we heard oral argument in this appeal, the Supreme Court has decided *Farrar v. Hobby*, ___ U.S. ___, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), in which it was held that plaintiffs who had won only a dollar from one of six defendants in a suit seeking seventeen million dollars were "prevailing parties" under § 1988, but that a fee award of $280,000 was unreasonable given their only nominal success. In its general discussion of prevailing party status, the Court explained that

> to qualify as a prevailing party, a civil rights plaintiff must obtain at least some relief on the merits of his claim. *The Plaintiff must obtain an enforceable judgment against the defendant from whom fees are sought. Hewitt, supra,* 482 U.S., at 760, 107 S.Ct., at 2675, *or comparable relief through a consent decree or settlement, Maher v. Gagne,* 448 U.S. 122, 129, 100 S.Ct. 2570, 2574, 65 L.Ed.2d 653 (1980). Whatever relief the plaintiff secures must directly benefit him at the time of the judgment or settlement. *See Hewitt, supra,* 482 U.S., at 764, 107 S.Ct. at 2677. Otherwise the judgment or settlement cannot be said to "affec[t] the behavior of the defendant toward the plaintiff." *Rhodes,* 488 U.S., at 4, 109 S.Ct., at 203. Only under these circumstances can civil rights litigation effect "the material alteration of the legal relationship of the parties" and thereby transform the plaintiff into a prevailing party. [*Texas State Teachers Ass'n v.*] *Garland* [*Indep. Sch. Dist.*], *supra,* 489 U.S. [782], at 792-793, 109 S.Ct. [1486], at 1493 [103 L.Ed.2d 866 (1989)] [(1989)]. In short, a plaintiff "prevails" when *actual relief* on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff. (emphasis added).

Id. at ___, 113 S.Ct. at 573.

In a post-argument filing at our request, the State contends that in this passage – particularly the emphasized portions – the Supreme Court has now rejected the "catalyst theory" of "prevailing party" status, as recognized and applied, for example, in our *Bonnes I, DeMier,* and *Spencer* decisions, and now in Part II of this opinion. Under *Farrar's* plain dictate, says the State, a § 1983

claimant can now be found a prevailing party only if his action terminated in an "enforceable judgment against the defendant . . . or [produced] comparable relief through a consent decree or settlement." Here, continues the State, there has been neither a consent decree nor a settlement, and the only judgment obtained against the State-defendants was vacated on mootness grounds and therefore is not enforceable.

We disagree. We do not believe that, properly read, *Farrar* rejects the catalyst theory of prevailing party status. If the one sentence in *Farrar* that specifies "enforceable judgment, consent decree, or settlement" is lifted out of context and treated as being all the Court said on the subject, it surely could be read as at least an oblique death-knell for the catalyst theory. But the context as defined by the actual issue before the *Farrar* Court and by what else the Court said on the subject belies any such drastic reading.

Given the importance that the catalyst theory long has had in prevailing party doctrine under 42 U.S.C. § 1988, we would expect that if the Court intended to hold it no longer a viable theory it would address the issue head-on in a case in which it was dispositive.[2] That

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[2] And with a careful elaboration of reasons rather than the cryptic passage of *dicta* which the dissent says we should read as a "decision that controls this case," *Dissenting Op.* at 172. The implausibility of reading that much into it is best illustrated by the very form and extent of the dissent's effort to demonstate why we should. Rather than simply resting on the plain text of the passages, which we are told at the start suffices, *see id.* at 167, the dissent is then largely and lengthily devoted (Part II, with sub-Parts A, B. C and D), to explaining why catalyst theory is

was not so in *Farrar*. The theory's viability was not an issue in *Farrar*, where plaintiffs had obtained a final judgment, and therefore had no need to invoke "catalyst" theory. The issues in *Farrar* were simply whether (1) a claimant who recovers only nominal damages can ever be considered a "prevailing party", and (2) if so, whether the hefty fee award there at issue could be upheld as a "reasonable" one under § 42 U.S.C. § 1988. The Court never mentioned the catalyst theory, and the passage upon which the State relies occurs, as dicta, in a general discussion of "prevailing party" status.

Furthermore, several earlier decisions of the Court that were cited in *Farrar* as authoritative on the general issue of prevailing party status, *see id.* ___ U.S. at ___, 113 S.Ct. at 572-73, had either expressly or tacitly recognized the catalyst theory's viability, or reserved decision on its exact contours. *See Hanrahan v. Hampton*, 446 U.S. 754, 758, 100 S.Ct. 1987, 1989, 64 L.Ed.2d 670 (1980) (per curiam) (noting legislative history which "indicates that a person may in some circumstances be a 'prevailing party'

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bad theory that should be discarded. *Id.* at 168-71. The suggestion must be that all this was implicit in the *Farrar dicta*, for otherwise the position it advances is flatly foreclosed by long-settled circuit (and general) precedent. But the *Farrar* Court, of course, never intimated that it was engaged in any such thoroughgoing reexamination of catalyst theory. Were it to do so, it is just such an explanation as the dissent gratuitously offers in this case that we would expect – and, with all respect, are entitled to expect – when the Court is about something as important as the dissent claims for it here. We think we show respect rather than disrespect for the Court and its processes, and for the values of *stare decisis*, when we act on that expectation.

without having obtained a favorable 'final judgment' " . . . or "without formally obtaining relief"); *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983) (case remanded specifically to consider whether claimant's "lawsuit was not a catalyst" for achieving favorable result on issue actually decided against claimant); *Kentucky v. Graham*, 473 U.S. 159, 165 n. 9, 105 S.Ct. 3099, 3104 n. 9, 87 L.Ed.2d 114 (1985) ("we express no view as to the nature or degree of success necessary to make a plaintiff a prevailing party"); *Hewitt v. Helms*, 482 U.S. 755, 763, 107 S.Ct. 2672, 2677, 96 L.Ed.2d 654 (1987) ("[w]e need not decide the circumstances, if any, under which this 'catalyst' theory could justify a fee award"). We do not believe that had the Court intended in *Farrar* to abrogate a theory this well-established, it would have cited without comment these earlier decisions which, as a matter of course, recognized its existence and utilization.

Finally, we note that this view of *Farrar's* non-impact upon the catalyst theory is shared by three other circuits which, since that decision, have had occasion to apply the theory with explicit awareness of *Farrar's* discussion of prevailing party doctrine. *See Paris v. U.S. Dept. of Housing & Urban Dev.*, 988 F.2d 236, 241 (1st Cir.1993) (fee award upheld on basis that plaintiff's suit, though unsuccessful on only issue litigated, was "fairly characterized as a catalyst", citing *Farrar's* discussion); *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255, 258 (6th Cir.1993) (denial of fee award reversed because justified on catalyst theory; district court error excused on basis that *Farrar* "was not available . . . at the time [of] its decision"); *Craig v. Gregg County*, 988 F.2d 18, 21 (5th

Cir.1993) (difficulty created by *Farrar* language noted, but found overcome by "[a] more precise reading" which contemplated continued viability of catalyst theory).

We therefore reject the State's contention that *Farrar* has made it no longer proper to find prevailing party status on a catalyst theory, and we therefore stand on our application of that theory in Part II of this opinion.[3]

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[3] The contention might also be rejected on the alternative basis that the finding of prevailing party status here is not dependent upon availability of the catalyst theory in the first place. As indicated in Part II, the plaintiff here did actually obtain an enforceable judgment against the state defendants on the critical issue litigated. And as further indicated there, we do not believe that the later vacatur of that judgment upon our dismissal of the appeal as moot for prudential reasons should have any effect on the plaintiffs' entitlement to a fee award as prevailing parties. The critical reference point for assessing prevailing party status in a fully litigated case is upon entry of the primary judgment on the merits of the case. A later appellate reversal or vacatur of such a favorable judgment *on the merits* obviously requires reversal or re-examination of a prevailing party determination based upon it. But not one, such as that here, which was not on the merits. *Cf. Maloney v. Marietta*, 822 F.2d 1023 (11th Cir.1987) (preliminary injunction in voting rights case vacated as moot following voluntary compliance by defendants; fees properly awarded to plaintiffs as prevailing parties); *Taylor v. Ft. Lauderdale*, 810 F.2d 1551 (11th Cir.1987) (same, where City passed mooting ordinance following entry of preliminary injunction); *Williams v. Alioto*, 625 F.2d 845 (9th Cir.1980), *cert. denied*, 450 U.S. 1012, 101 S.Ct. 1723, 68 L.Ed.2d 213 (1981) (same, where police voluntarily ceased enjoined conduct while preliminary injunction on appeal).

The dissent's contention that the vacatur for mootness here should be thought to wipe out the "enforceable judgment" for fee award purposes, *Dissenting Op.* at 168, has an ironic and illogical twist worthy of note. Our dissenting brother joined in

IV

Having found no error in the district court's determination that the parents were prevailing parties entitled under 42 U.S.C. § 1988 to attorneys' fees, we affirm.

AFFIRMED.

WILKINSON, Circuit Judge, dissenting:

I cannot subscribe to the majority's evisceration of the Supreme Court's decision in *Farrar v. Hobby*, ___ U.S. ___, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992). The language of *Farrar* is plain: "[T]o qualify as a prevailing party . . . [t]he plaintiff must obtain an enforceable judgment . . . or comparable relief through a consent decree or settlement." *Id.* at ___, 113 S.Ct. at 573. "Whatever relief the plaintiff secures must directly benefit him at the time of *the judgment or settlement." Id.* (emphasis added). *"Only* under these circumstances can civil rights litigation effect 'the material alteration of the legal relationship of the

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the panel decision that directed vacatur of the judgment against the state defendants on mootness grounds, but that remanded with express directions for a determination whether fees should be awarded. *See* 832 F.2d at 298. Unless we are prepared to believe him capable of cruel hoax – which obviously we aren't – this must indicate that he didn't at the time think the vacatur would make fee award inappropriate. Even if *Farrar* in the interval were read to require an "enforceable judgment" (or settlement), nothing in that opinion touches the question of the effect of a mootness vacatur on such a judgment once obtained. The exact language in *Farrar* is "obtain an enforceable judgment;" it doesn't add "that is still in effect at the time of fee award." If the *Farrar* passage deserves the literal reading for precedential purposes that the dissent claims for it, it deserves that reading throughout.

parties' and thereby transform the plaintiff into a prevailing party." *Id.* (emphasis added). "No material alteration of the legal relationship between the parties occurs *until* the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." *Id.* at ___, 113 S.Ct. at 574 (emphasis added).[1]

Each of the above statements is now rendered meaningless by the majority's direction to district courts to "look outside the final judgment" and beyond "the merits of the basic controversy" in awarding attorneys' fees under § 1988. Majority Op. at 164. With respect, the resemblance between the Supreme Court's view of fee recovery and that of the majority quite eludes me. *Farrar* states that without a demonstrated legal entitlement, plaintiffs cannot be deemed to have prevailed. The majority states that, notwithstanding *Farrar*, vague "catalyst" theories of causation continue to control who is a prevailing party under 42 U.S.C. § 1988. There is no way, however, that *Farrar* and a broad "catalyst theory" of

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[1] The majority discards as "dicta" and dismisses as "cryptic" this extended discussion on the part of the Supreme Court whose meaning could not be more clear. *See* Majority Op. at 166-67 n. 2. We are entitled to disregard it, the majority says, because the Supreme Court failed to utter the words "catalyst theory" in the course of its discussion or to elucidate its reasoning in a manner sufficiently "careful" to satisfy the majority. *See id.* The majority makes no attempt to reconcile the Supreme Court's opinion with the continued existence of "catalyst theory." With all respect, this is a nervy course – while a circuit court is necessarily entrusted with the interpretation and application of Supreme Court pronouncements, it is not empowered, *sua sponte*, to set them aside.

attorneys' fees recovery can be reconciled.[2] I shall first address the particulars of this case, and then turn to a broader critique of the catalyst theory upon which the majority rests its case.

I.

Plaintiffs in this case fall short of meeting the rule laid down in *Farrar*. They obtained a judgment on the merits of their claim, but that judgment is no longer enforceable. The judgment's vacatur on appeal renders it a legal nullity. *See S-1 v. Spangler*, 832 F.2d 294 (4th Cir.1987). *Farrar* is explicit on this point: "[t]he plaintiff

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[2] The cases from other circuits cited by the majority are no more persuasive in resuscitating catalyst theory. With all due respect, those cases fail to come to grips with *Farrar*'s ruling that "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." ___ U.S. at ___, 113 S.Ct. at 574. *Paris v. HUD*, simply ignores *Farrar*'s requirement of a legal victory, citing the case only in passing. 988 F.2d 236, 238 (1st Cir.1993). *Citizens Against Tax Waste v. Westerville City School* quotes *Farrar*'s standard in a footnote, but nonetheless invokes *Farrar* in support of a pure catalyst theory to reverse a district court denial of fees. 985 F.2d 255, 258 and n. 3 (6th Cir.1993). In sum, the cases cited by the majority do not come to terms with the inconsistency between *Farrar* and catalyst theory. I would not follow their example.

Finally, in *Craig v. Gregg County*, the court acknowledged the conflict between *Farrar* and catalyst theory, but skirted the issue by finding as a matter of fact that plaintiff had not been a catalyst for the county's reconfiguration of a voting precinct. 988 F.2d 18, 21 (5th Cir.1993) ("A more precise reading of *Farrar* . . . *might* suggest that a party may prevail [via catalyst theory]," (emphasis added) but plaintiff "has not shown that *his suit caused* [the defendant's change in conduct].").

must obtain an enforceable judgment *against the defendant from whom fees are sought.*" ___ U.S. at ___, 113 S.Ct. at 573 (emphasis added). Plaintiffs certainly have prevailed against the City Board via their settlement, but the State Board has not settled and there is no judgment remaining against it.

In crediting plaintiffs' vacated judgment against the State Board, the majority effectively deprives the state defendants in this case of their right to an appeal. And by adopting a porous standard for prevailing party status – that a plaintiff's position be "arguably supported by case or statutory law," Majority Op. at 165 – the majority subjects these defendants to liability for attorneys' fees without offering them the opportunity to refute the claims asserted against them. There is a virtue in the recognition that the vindication of legal rights is the proper end of all litigation. Without an *enforceable* judgment or settlement, however, it becomes difficult to discern what legal rights of plaintiffs have been violated or vindicated. This court properly recognized in its earlier decision that defendants had raised a constitutional issue of real "difficulty and sensitivity" involving "the power of the federal courts, acting within the constraints of the eleventh amendment, to interfere by injunction with the internal process of a state administrative agency." *Spangler*, 832 F.2d at 298. The defendants in this case continue to insist that their view of the Individuals with Disabilities Education Act is the legally correct one. The majority never says otherwise – in its view all that is required to award attorneys' fees against these defendants is for plaintiffs to state a "colorable claim" Majority Op. at 166.

The majority attempts to explain away plaintiffs' failure to secure an enforceable judgment by writing off as "dicta" the rule laid down in *Farrar*, Majority Op. at 167. The majority instead clings to a broad catalyst standard for recovery of attorneys' fees under 42 U.S.C. § 1988. The causal story recounted by the majority in this case demonstrates the tenuous connection between a lawsuit and changes in conduct that will suffice to subject defendants to liability for attorneys' fees under catalyst theory. Plaintiffs are found here to have been a "catalyst" for changes made by the State because (1) OSERS agreed with plaintiffs' legal position in a Letter Ruling in an unrelated case, and (2) the State amended its laws three years after plaintiffs' case was mooted, in response to the threatened loss of five million dollars in federal funding.

Even under the expansive standards of catalyst theory, this evidence of causation is astonishingly thin. Plaintiffs' lawsuit lost whatever force it had as a catalyst the day it was mooted by this court. I do not understand how moot lawsuits, in which the possibility of relief against a party is by definition foreclosed, continue nonetheless to function as catalysts for change and for the recovery of attorneys' fees. In this sense, the majority has stood finality on its head – the "prevailing party" standard in 42 U.S.C. § 1988 requires that we consult the confines of a case, not plumb the legal hereafter.[3]

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[3] The "voluntary compliance" cases cited by the majority, *see* Majority Op. at 167 n. 3, are easily distinguishable from the instant case. The cases relied on by the majority reflect only the principle that when a plaintiff is successful in obtaining a preliminary injunction based on its probability of success, the defendant's voluntary cessation of *unlawful* conduct need not

II.

Quite apart from the difficulties of applying catalyst theory to this particular case, I cannot agree with the majority's vocal endorsement of catalyst theory as a means of determining prevailing party status under § 1988. The problems with that theory are prodigious.

A.

First, the catalyst theory of fee recovery conflicts with the plain language of § 1988 itself. Section 1988 allows awards of reasonable attorneys' fees to a "prevailing *party*," not simply to anyone who influences a change in behavior or policy. 42 U.S.C. § 1988 (emphasis added).

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deprive plaintiffs of prevailing party status. That is quite different from our case, where the change in conduct occurred in response to a third-party's view after we declared the lawsuit moot, where we have never adjudged the state's conduct to be unlawful, and where we explicitly credited defendants with raising a complex question of federal law which we then declined to address. The inappropriateness of an attorney's fee award against defendants in this latter set of circumstances should be apparent.

The majority purports to see some inconsistency between my position here and my joining the earlier remand to the district court to determine whether fees should be awarded. *See id.* The very terms of the remand presupposed, however, that the basis for any award would return here for review. Further, the earlier decision itself emphasized that "[b]y remanding we of course express no view on the parents' entitlement to costs and attorney's fees against the state defendants." 832 F.2d at 298 n. 3. I make no apologies for following a Supreme Court decision that has issued between the last appeal and the disposition of this one. Indeed, if the majority believed *Farrar* to be persuasive authority, it presumably would follow it too.

For individuals to recover fees, they must prevail in their status as parties, not in their role as agents of reform. And to *prevail* for § 1988 purposes, *parties* must succeed on the merits of a claim. *Farrar*, ___ U.S. at ___, 113 S.Ct. at 573. In other words, success must be something buttressed by a court's authority or required by a rule of law. The lawsuit must materially alter the "legal relationship" between plaintiffs and defendants. *See Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 792-93, 109 S.Ct. 1486, 1493, 103 L.Ed.2d 866 (1989). *Farrar* makes plain that "[n]o material alteration of the legal relationship between the parties occurs until the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant." ___ U.S. at ___, 113 S.Ct. at 574.

B.

Second, catalyst theory ignores the Supreme Court's recent decisions. The majority says it is inconceivable that *Farrar* ever intended to disturb something so "well-established" as the catalyst theory for the recovery of attorneys' fees. Majority Op. at 167.[4] Far from overturning a

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[4] In this context, the majority's reference to *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 1939, 76 L.Ed.2d 40 (1983), as being a "case remanded specifically to consider whether claimant's 'lawsuit was not a catalyst' for achieving a favorable result," Majority Op. at 167, is anything but an endorsement of catalyst theory. That case involved an award to a "partially prevailing plaintiff" who had actually obtained a judgment on the merits. *Hensley*, 461 U.S. at 426-28, 103 S.Ct. at 1935-36. The issue of prevailing party status simply was not raised.

"well-established" theory, however, *Farrar*'s specification of judgments, consent decrees, and settlement agreements as the exclusive avenues to prevailing party status under § 1988 follows from prior Supreme Court caselaw. Before *Farrar*, the Court had noted a supposed fourth avenue. In *Hewitt v. Helms*, 482 U.S. 755, 760-61, 107 S.Ct. 2672, 2675-76, 96 L.Ed.2d 654 (1987), the Court observed that a § 1988 fee award could be justified if a lawsuit produced a voluntary "change in conduct" by a defendant that redressed a plaintiff's grievance. With this language, however, the Court did not endorse catalyst theory; it specifically reserved judgment on that question. 482 U.S. at 763, 107 S.Ct. at 2677. Nor did the Court's language extend the ways to attain prevailing party status beyond the three situations later listed in *Farrar*. *Farrar*'s inclusion of settlements between parties encompasses both monetary settlements and agreements to a change in conduct. *See Farrar*, ___ U.S. at ___, 113 S.Ct. at 573; *see also Hewitt*, 482 U.S. at 760, 107 S.Ct. at 2675. A plaintiff securing such a settlement can certainly be deemed to have prevailed in the absence of a formal judgment. *See Hewitt*, 482 U.S. at 761, 107 S.Ct. at 2676. *Farrar* merely clarified *Hewitt* by stressing that a voluntary change in conduct must be formalized in a legally enforceable settlement agreement to transform a plaintiff into a prevailing party for purposes of § 1988.

Other cases have similarly clarified *Hewitt*. For example, *Hewitt* stated that the change in a defendant's conduct must redress a grievance. 482 U.S. at 761, 107 S.Ct. at 2676. Cases since *Hewitt* have narrowed this idea of grievance to make it a legal grievance. *See Garland*, 489 U.S. at 792-93 (focusing on the change in "legal relationship");

Rhodes v. Stewart, 488 U.S. 1, 3-4, 109 S.Ct. 202, 203, 102 L.Ed.2d 1 (1988) (per curiam) (holding that plaintiffs did not prevail when they were no longer in custody and judgment provided them with no legal relief). In other words, the change in conduct must be enforceable in court, not merely gratuitous. *Farrar*'s specification of the three avenues by which a party can prevail for § 1988 purposes does no more than continue the process of refining *Hewitt*. In its embrace of catalyst theory, the majority not only ignores *Farrar*, it bucks a clear decisional trend.

C.

Third, the catalyst theory of fee recovery engenders confusion and unnecessary litigation. By providing a clear rule for achieving prevailing party status, *Farrar* promises to reduce litigation over attorneys' fees. The majority's concern over the "specter of satellite litigation," is well-founded, Majority Op. at 164, but the catalyst theory adopted by the majority then proceeds to exacerbate that very problem. Too frequently, legal battles over attorneys' fees merely add another round of protracted litigation to what already has been protracted litigation on the merits of a claim. *Compare Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983) ("A request for attorney's fees should not result in a second major litigation."). This collateral litigation over attorneys' fees is often more heated, more arcane, and over far higher monetary stakes than the underlying lawsuit. The relationship of all of this activity to the larger public good is becoming increasingly difficult to discern. *Farrar*'s crucial insights are that the refuge

from such litigation lies in a clearly established rule for fee recovery and that the catalyst-based approach to fee applications has left us utterly at sea.

The majority's standards for fee recovery under catalyst theory fail to chart a clear course through this litigious fog. We are told that the catalyst inquiry is "a pragmatic one of both fact and law that will ordinarily range outside the merits of the basic controversy . . . to whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant's efforts contributed in a significant way." and that "[courts] should look outside the final judgment to voluntary actions taken by a defendant so long as those actions are causally connected to the litigation." Majority Op. at 164 (citations omitted). How far outside the merits should courts look? What is a significant contribution? When is a lawsuit causally connected and when is it not? What is the meaning of "in whatever form" an outcome is realized? The majority does not provide any guidance – only criteria that invite further litigation. In contrast to the majority's approach, *Farrar*'s clear rule ensures that parties deserving attorneys' fees will obtain them without forcing district courts to untangle a web of supposed causal connections to determine whether a party prevailed.

D.

Finally, catalyst theory discourages public officials from taking initiatives to revise out-moded ordinances or to improve institutional conditions, because such theory

expressly recognizes "voluntary actions taken by a defendant" as a proper basis for a fee award. Majority Op. at 164. With its reliance on a simple chronology of events to show causation, catalyst theory empowers courts to award fees for *any* change in behavior that occurs after the filing of a lawsuit, whether or not the court could have ordered that change in conduct. In this way, catalyst theory serves to disable public officials, who may come to fear that worthwhile changes may be retroactively linked to a lawsuit and result in a hefty bill for attorneys' fees. It is counterproductive to convert § 1988 into a penalty on state and local officials for making salutary changes. At the same time, catalyst theory provides incentives for filing marginal, even frivolous, lawsuits. Any change in conduct by the defendant, for whatever reason, may offer a promising payout to attorneys who file a complaint, whether or not that complaint has any ultimate legal merit. Section 1988 should not be a license to shake down government officials, nor was it ever intended to be simply "a relief Act for lawyers." *Farrar*, ___ U.S. at ___, 113 S.Ct. at 578 (O'Connor, J., concurring), *quoting Riverside v. Rivera*, 477 U.S. 561, 588, 106 S.Ct. 2686, 2701, 91 L.Ed.2d 466 (1986) (Rehnquist, J., dissenting).

Catalyst theory is so open to fee awards because it assumes that enlightened social change automatically results from lawyers pursuing litigation. Unconstrained catalyst theory betrays the disquieting presumption that litigation must somehow lead the march of social progress. With § 1988, however, Congress did not grant parties a license to collect fees for pursuing personal visions of the public good. Rather, § 1988 compensates

parties for attorneys' fees incurred in bringing and successfully concluding lawsuits. Congress recognizes litigation under 42 U.S.C. § 1983 as a desired vehicle to vindicate the violation of legal rights, not as a means of effecting social change of the generic sort. In our system of government, we have looked first to elected officials to decide what change may or may not be considered enlightened. Section 1988 does not alter the basic democratic premise. Congress has said that attorneys' fees may be awarded to prevailing parties who have established legal claims. That requires a judgment, consent decree, or settlement.

III.

Under *Farrar*, plaintiffs with valid civil rights claims will continue to have their day in court, assisted by counsel. Citizens may still "assert their civil rights," and those who would violate such basic rights shall not "proceed with impunity," because parties retain the chance "to recover what it costs them to vindicate these rights *in court*." S.Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910 (emphasis added). *Farrar* assures, however, that when a court awards "fees to a prevailing plaintiff, it is awarding them against a violator of federal law," *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418, 98 S.Ct. 694, 699, 54 L.Ed.2d 648 (1978), not against an entity that improves a facility or changes a policy on its own initiative. By contrast, a theory of fee-shifting based upon changes in conduct that judges might consider constructive transfers the evaluation of many public actions to the unaccountable preferences of federal courts.

Plaintiffs in this case have not secured an enforceable judgment, consent decree, or settlement agreement. I would not award them attorneys' fees on the basis that their mooted lawsuit may have operated as a catalyst to subsequent changes in defendants' conduct. With all respect to my colleagues, we have in *Farrar v. Hobby* a Supreme Court decision that controls this case. We should follow it.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

S-1 and S-2, by and through their parents and Guardians Ad Litem, P-1 and P-2; and P-1 and P-2, Individually,

Plaintiffs,

C. D. SPANGLER, JR., Chairman, State Board of Education of North Carolina; THE STATE BOARD OF EDUCATION OF NORTH CAROLINA; and C. D. HEIDGERD, Hearing Officer, Asheboro City Board of Education,

Defendants.

MEMORANDUM OPINION

(Filed March 30, 1992)

BULLOCK, District Judge

This final phase of lengthy litigation involves the question of whether plaintiffs are entitled to attorneys' fees in this action under the Education for All Handicapped Children Act, 20 U.S.C. § 1415(e) (1991) (EAHCA),[1] and if they are so entitled, in what amount. For the reasons explained herein, the court finds that Plaintiffs are prevailing parties, and that they are entitled to reasonable attorneys' fees in the amount of $30,143.18.

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[1] The EAHCA provides federal funding to the states so that each disabled child can receive a free appropriate public education. 20 U.S.C. § 1400 (1991).

I.

When this action began, S-1- and S-2 were handicapped students in the Asheboro City Schools. The parents of S-1 and S-2 decided to place them in a private educational facility on a half-day basis for the 1983-84 school year, and sought reimbursement from the school system for their tuition expenses. The Asheboro Board of Education denied this request, so Plaintiffs sought a due process hearing pursuant to North Carolina General Statutes § 115C-116, which was enacted pursuant to the EAHCA. At that time, Section 115C-116 allowed the State Board to select a hearing officer from its own list of approved hearing officers if a due process hearing was requested, and provided for a final decision by the State superintendent of Public Instruction. 1985 N.C. Sess. Laws ch. 412 (June 17, 1985). The hearing officer appointed to hear the parents' claim for reimbursement found that he had no statutory authority to determine or award reimbursement, so no hearing was held. The State Board of Education denied Plaintiffs' request to confer this authority upon the hearing officer. Plaintiffs then brought this action under 42 U.S.C. § 1983 and Section 1415(e) of the EAHCA.

On December 31, 1986, this court entered a memorandum opinion and order holding that Section 1415(b)(1)(E) of the EAHCA required Defendants Asheboro City Board of Education ("City Board") and C. D. Heidgerd to conduct an administrative hearing and render a decision on Plaintiffs' claim for tuition reimbursement under the EAHCA. The court also declared that the interpretation of North Carolina law of Defendants C. D. Spangler and State Board of Education ("State Board") violated Section

1415(b)(1)(E) in that it precluded a state hearing officer from conducting an administrative hearing on the issue of reimbursement under the EAHCA and from ordering reimbursement if appropriate. The court enjoined all Defendants from further interpreting North Carolina law inconsistent with its interpretation of Section 1415(b)(1)(E). *S-1 By and Through P-1 v. Spangler,* 650 F. Supp. 1427, 1434-35 (M.D.N.C. 1986), *vacated,* 832 F.2d 294 (4th Cir. 1987).

Defendants appealed this court's decision. While the appeal was pending, the parents and the City Board (but not Defendants Spangler and State Board) agreed to a partial settlement. The United States Court of Appeals for the Fourth Circuit held that the settlement mooted the appeal because it gave the parents the reimbursement they sought; vacated this court's order of December 31, 1986; and remanded for a determination of Plaintiffs' entitlement, if any, to attorneys' fees from Spangler and the State Board. *S-1 v. Spangler,* 832 F.2d 294, 298 (4th Cir. 1987).

Also while the appeal was pending, the Office of Special Education and Rehabilitative Services (OSERS), the division of the United States Department of Education charged with overseeing the EAHCA, issued a Letter Ruling on June 17, 1987, endorsing this court's 1986 holding and specifically disapproving of the State Board's EAHCA due process procedures. In view of this Letter Ruling, the North Carolina General Assembly amended Section 115C-116 to allow the administrative law judge presiding over the due process hearing to recommend a decision to the State Board. The final decision on the parents' claim would rest with the State Board or two of

its members designated by the Board to make the final decision. 1988 N.C. Sess. Laws ch. 1079 (July 8, 1988).

OSERS objected to the revised statute, claiming that it did not meet the standards set out in Section 1415 and requiring the State to comply with federal law by June 30, 1990. Threatened with the loss of some $5 million in federal education funds for failure to comply, the General Assembly again amended Section 115C-116. The amendment provided that the administrative law judge's findings of fact and conclusions of law would become final unless appealed to the State Superintendent of Public Instruction. If appealed, the Superintendent could appoint a disinterested educator to enter final findings of fact and conclusions of law. 1990 N.C. Sess. Laws ch. 1058 (July 28, 1990).

In their petition for attorneys' fees pursuant to 20 U.S.C. § 1415(e) and 42 U.S.C. § 1988, Plaintiffs assert that they are entitled to fees because they prevailed in the underlying dispute. Defendants contend that Plaintiffs are not entitled to attorneys' fees because they did not prevail on the merits and the amendments to Section 115C-116 were attributable to the threatened loss of federal funding rather than to any action by the Plaintiffs.

II.

The first question to be decided is whether the Plaintiffs are prevailing parties in this matter. Section 1415(e)(4)(B) of the EAHCA permits the court, in its discretion, to award reasonable attorneys' fees to the parents of a disabled youth who prevail in an action under Section 1415(e). Similarly, 42 U.S.C. § 1988 entitles

a prevailing party in an action under 42 U.S.C. § 1983 to recover costs and attorneys' fees. The difference between this case and others that seek attorneys' fees is that the Plaintiffs did not prevail on the merits of the underlying dispute because the Fourth Circuit vacated this court's judgment in their favor.

However, there is significant authority for the proposition that parties do not have to win a judgment in order to recover attorneys' fees. "Plaintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Echerhart*, 461 U.S. 424, 433 (1983) (quoting *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 [1st Cir. 1983]).[2] In a decision affirming and clarifying *Hensley*, the Supreme Court noted that "[t]he touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute." *Texas Teachers Ass'n v. Garland School Dist.*, 489 U.S. 782, 792-93 (1989).

The Fourth Circuit has outlined an analytical framework for determining prevailing party status. First, the court should establish "the precise factual/legal condition that the fee claimant has sought to change or effect so as to gain a benefit or be relieved of a burden." *Bonnes*

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[2] This standard applies to "all cases in which Congress has authorized an award of fees to a 'prevailing party.' " *Hensley*, 461 U.S. at 433 n. 7 (42 U.S.C. § 1988 case); *see Tice v. Botetourt County School Bd.*, 908 F.2d 1200, 1205 n.4 (4th Cir. 1990) (applying *Hensley* standard to EAHCA case).

v. Long, 599 F.2d 1316, 1319 (4th Cir. 1979). Then, the court must evaluate "whether as a quite practical matter the outcome, in whatever form it is realized, is one to which the plaintiff fee claimant's efforts contributed in a significant way, and which does involve an actual conferral of benefit or relief from burden when measured against the benchmark condition." *Id.; see Disabled in Action v. Mayor of Baltimore*, 685 F.2d 881, 885 (4th Cir. 1982).

This analysis may look beyond the resolution of a case on its merits. "[T]o get a truer picture of plaintiff's success we should look outside the final judgment to voluntary actions taken by a defendant so long as those actions are causally connected to the litigation." *Spencer v. General Elec. Co.*, 894 F.2d 651, 662 (4th Cir. 1990); *Child v. Spillane*, 866 F.2d 691, 692-93 (4th Cir. 1989); *Denny v. Hinton*, 131 F.R.D. 659, 662 (M.D.N.C. 1990), *aff'd*, 937 F.2d 602 (4th Cir. 1991). If the plaintiff's actions are a catalyst for a remedial change in the defendant's actions, the plaintiff has prevailed. *DeMier v. Gondles*, 676 F.2d 92, 93 (4th Cir. 1982); *Smith v. University of North Carolina*, 632 F.2d 316, 347 (4th Cir. 1980).

In this case, there is a distinct causal connection between the harm the Plaintiffs sought to rectify by bringing suit and the ultimate revision of North Carolina General Statutes § 115C-116 to conform to federal law. The Plaintiffs complained that the North Carolina due process procedures, as they existed in 1985, violated the EAHCA. This court's December 1986 judgment for the Plaintiffs prompted OSERS to issue an official policy statement in June 1987 agreeing that the North Carolina procedure violated federal law. In July 1988, the North Carolina legislature amended the offending statute in an

attempt to comply with OSERS' mandate. Having become involved in the correction of North Carolina laws as a result of this court's 1986 judgment,[3] OSERS determined that the 1988 amendment was insufficient and on July 23, 1989, demanded a further amendment to comply with the finality and impartiality requirements of the EAHCA. North Carolina approved the complying amendment in July 1990 in time to avoid the loss of federal funding for its EAHCA programs.

Thus, regardless of the outcome of the underlying litigation, by virtue of Plaintiffs' complaint sufficient federal pressure was brought to bear on the State of North Carolina that Section 115C-116 was amended to comply with federal law. This is not a mere technical or *de minimis* victory that would bar Plaintiffs from being prevailing parties. *Texas Teachers Ass'n*, 489 U.S. at 792; *Spencer*, 894 F.2d at 662. Therefore, the court finds that Plaintiffs are prevailing parties and are entitled to attorneys' fees under 20 U.S.C. § 1415(e).[4]

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[3] The OSERS Letter Ruling informs the inquirer that "this office will review all future State plans to ensure that they meet minimum due process requirements." Letter Ruling at 2 (June 17, 1987).

[4] Because Plaintiffs prevailed on their claim by obtaining an [sic] change in the North Carolina law enacted pursuant to the EAHCA rather than any relief or remedy on their Section 1983 claim, attorneys' fees will be awarded only under Section 1415(e). *See Smith v. Robinson*, 468 U.S. 992, 1012-13 (1984) (sole remedy in EAHCA cases is to be found in the Act itself and not in 42 U.S.C. § 1988); S. Rep. No. 112, 99th Cong., 2d Sess. 2, *reprinted in* 1986 U.S.C.C.A.N. 1798, 1799 (purpose of amending EAHCA to add attorneys' fees provision was to remedy deficiency identified in *Smith v. Robinson*).

III.

The next determination to be made is the appropriate amount of attorneys' fees to be awarded. Plaintiffs petitioned this court for a net fee reimbursement of $39,015.18.[5] Defendants argue that over half the number of hours billed is unreasonable and should be disallowed.

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley*, 461 U.S. at 433. Hours that are unreasonable include those that are "excessive, redundant, or otherwise unnecessary." *Id.* at 434. There is no evidence from the billing statements submitted by the parties that the total of 463.05 hours billed over a four-year period is unreasonable in any respect. Therefore, the court finds that the 463.05 hours expended was reasonable within the meaning of Section 1415(e)(4)(B).

The documentation provided to the court indicates that 316.15 hours were billed at $90.00 per hour, and 146 hours were billed at $110.00 per hour. The EAHCA requires an award of attorneys' fees to be made based on prevailing rates in the community for similar services, and prohibits the use of a bonus or multiplier in calculating the award amount. 20 U.S.C. § 1415(e)(4)(C). This court in its experience and discretion finds that these

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[5] The total amount billed was $47,047.18, reduced by $8,032.00 recovered as a result of the settlement with the Asheboro City Schools.

hourly rates are manifestly reasonable in light of customary hourly rates for legal services in the Middle District of North Carolina.

The reasonable hours times reasonable rate calculation is only the beginning of the inquiry, for this court must next determine whether the award is reasonable in relation to the results obtained. *Hensley,* 461 U.S. at 434. Plaintiffs contend that since their initiation of this action resulted in a complete revision of the North Carolina EAHCA due process procedures they obtained excellent results and are entitled to reimbursement of all expenses. Defendants argue that since over half of the hours expended involved either the Defendants who settled or motions that were unsuccessful the results obtained were less than excellent and the fee award should be reduced accordingly.

There is little merit to Defendants' contention that fees incurred in reaching settlement indicate less than excellent results. Plaintiffs sought and obtained reimbursement for their tuition expenses via the settlement with the City Defendants. Parties may prevail through settlement or other measures short of formal relief. *Maher v. Gagne,* 448 U.S. 122, 129 (1980). The amount of fees requested already reflects a reduction to account for settlement with the City Defendants, so no further reduction need be made for fees incurred as to them. Failure to prevail on a motion when the claim is successful as a whole is not a basis to deny fees related to the unsuccessful motion. *Hensley,* 461 U.S. at 435. Therefore, the fees incurred as to the unsuccessful discovery motions and the appeal should be included in the final amount of the attorneys' fees award. The only fees this court believes to

be questionable are those related to the unsuccessful motions to intervene, because they were made on behalf of persons not parties to this action. Hence, they are unrelated claims that should "be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services on the unsuccessful claim." *Id.* The fees attributable to the motions to intervene total $8,872.00.

After a careful review of Plaintiffs' petition for attorneys' fees, the court finds that they are reasonable in light of the result obtained subject to the reservation expressed above. To avoid a "second major litigation" over the amount of attorneys' fees due Plaintiffs, *Hensley*, 461 U.S. at 437, the court will award Plaintiffs $30,143.18 in attorneys' fees. This amount represents the $39,015.18 requested, less $8,872.00 attributable to the motions to intervene.

An order in accordance with this memorandum opinion shall be entered contemporaneously herewith.

/s/ _____
United States District Judge

March 30, 1992

EHA RULINGS/POLICY LETTERS

Inquiry by: Gregory R. Van Buiten, Esq.
Van Buiten & Helmuth
174 Battery Street
Burlington, Vermont 05401

Digest of Inquiry
(October 6, 1986)

- Are hearing officers and state review officers authorized by EHA to order public agencies to reimburse parents for an appropriate unilateral placement?

Digest of Response
(June 17, 1987)

EHA-B requires states to authorize hearing officers to decide reimbursement claims and to order reimbursement where the conditions of *Burlington* are satisfied, *i.e.*, where the parents' placement is deemed appropriate and the LEA's placement is inappropriate.

Text of Inquiry

This office represents handicapped children and their families in Vermont and New Hampshire. The inquiry presented below to which we solicit a formal EHA ruling from the Department concerns the February 21, 1986 decision of Vermont state reviewing officer Judy Rosenstreich reported at 1985-86 EHLR DEC. 507:367. A copy of the decision is attached for your convenience. [Not reproduced]

The case concerns an LEA's decision which was not appealed and which is likely to be seen as "controlling precedent" by Vermont's hearing officers. Ms. Rosenstreich determined that a state reviewing officer, pursuant to 20 U.S.C. 1415(c) can *only* "make an independent decision upon completion of" her or his review of the record. Ms. Rosenstreich also found that a *court* could "grant such relief as . . . [it] determines is appropriate." 20 U.S.C. 1415(e)(2). Taking these two statutory provisions together, Ms. Rosenstreich found that "[t]here is no legal foundation on which to base a conclusion that in an administrative proceeding a reviewing officer can grant such relief." (i.e., reimbursement for tuition for unilateral placement.) Ms. Rosenstreich concluded that while she affirmed the parents' unilateral placement as appropriate, and affirmed the LEA's offer of placement as inappropriate, she was without legal authority to award reimbursement for the parents' appropriate unilateral placement; that relief in the form of financial reimbursement was only available in a court.

Our concern is that this decision forces any parent who seeks reimbursement for an appropriate placement to pursue the administrative procedures of due process and state review, without the possibility of resolving the reimbursement dispute at the administrative level. The only means of obtaining reimbursement, according to this decision, is an appeal to Federal or state court as a party aggrieved by the lack of reimbursement. This would seem to render the administrative proceedings futile.

We now have a case in which we are awaiting the hearing officer's decision. We anticipate a decision that the LEA's offered placement/program was inappropriate;

that the parents' unilateral placement/program was appropriate; but that, pursuant to the subject Rosenstreich decision, we must appeal to a state reviewing officer and thereafter to a Federal or state court to obtain financial reimbursement.

Squarely, the issue on which we solicit a formal ruling is as follows: Do hearing officers and state reviewing officers have the authority to award the same forms of relief available to successful EHA litigants in the courts per 20 U.S.C. 1415(e)(2), specifically reimbursement for unilateral placement where the unilateral placement is deemed appropriate and the LEA's placement is inappropriate?

Text of Response

The Office of Special Education and Rehabilitative Services (OSERS) has completed its review of the issue of whether Part B of the Education of the Handicapped Act (EHA-B), P.L. 94-142, authorizes hearing officers and State reviewing officers to order public agencies to reimburse parents for unilateral placements that satisfy the conditions established by the U.S. Supreme Court in *Burlington School Committee v. Department of Education.*

Your earlier letter referenced a decision by a Vermont State reviewing officer (reported at 1985-86 EHLR DEC. 507:367) concluding that EHA-B enjoins administrative officers from granting parents reimbursement relief. We disagree with that interpretation of EHA-B. Sections 1415(b)(1)(E) and (b)(2) of EHA-B give parents the right to have *any* matter relating to the provision of a free appropriate public education (FAPE) for their child

resolved by an impartial hearing officer. The issue of reimbursement cannot be separated from a child's right to an appropriate education "at public expense." Thus, hearing officers and State reviewing officers have the authority to determine whether parents are entitled to be reimbursed for the unilateral placement of their child where the parents' placement is deemed appropriate and the LEA's placement is inappropriate.

This interpretation is further supported by Federal regulations requiring that, "disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, *and the question of financial responsibility,* are subject to the due process procedures under Regs. 300.500-300.514 of Subpart E." 34 C.F.R. 300.403(b) (emphasis added). These regulations, in turn, reflect Congressional intent that the administrative hearing process resolve the issue of reimbursing parents for the unilateral placement of their child, as cited by the Supreme Court in its *Burlington* decision, 105 S. Ct. at 2003:

> "If a parent contends that he or she has been forced, at that parent's own expense, to seek private schooling for the child because an appropriate program does not exist within the local educational agency responsible for the child's education and the local educational agency disagrees, the disagreement and the question of who remains financially responsible is a matter to which the due process procedures established under [the predecessor to Sec. 1415] appl[y]." S. Rep. No. 94-168, p. 32 (1975), U.S. Code Cong. & Admin. News 1975, pp. 1425, 1456.

In a recently released Federal District Court decision, *S-1 and S-2 v. Spangler and the State Board of Education of North Carolina*, Civil No. C-85-969-G (M.D.N.C. December 31, 1986) (appeal pending), the court examined the issue of whether EHA-B requires a State hearing officer to conduct a hearing on the issue of reimbursement and order reimbursement if appropriate. (A copy is attached for your information.) Judge Bullock held that North Carolina's refusal to allow its State hearing officers to decide reimbursement claims in the administrative process, and order reimbursement where appropriate, fell below the minimum level of procedural protection established by EHA-B and was thus invalid.

The court's reasoning in the *Spangler* decision is sound. It is premised upon the application of Congressional concern for ensuring that each child who is handicapped be provided a *free* appropriate public education and upon the Supreme Court's reasoning in *Rowley* and *Burlington* that recognizes the importance of procedural safeguards for ensuring this right. The *Spangler* decision is not premised upon an analysis of State law; thus the court's analysis does not require a balancing of State and Federal policies. OSERS concurs with the reasoning adopted by Judge Bullock in his *Spangler* decision and shares his opinion that EHA-B requires States to authorize its hearing officers to decide reimbursement claims in an impartial due process proceeding and to authorize these officers to order reimbursement where the conditions of *Burlington* are satisfied.

While it is not appropriate for OSERS to intervene in litigation currently subject to judicial review, you can be assured that this office will review all future State plans

to ensure that they meet minimum due process requirements for authorizing the determination of reimbursement issues and the issuance of reimbursement orders, where appropriate.

If we can be of further assistance, please do not hesitate to write.

Madeleine Will
Assistant Secretary
Office of Special Education and
Rehabilitative Services.

The Civil Rights Attorney Fee Awards Act, 42 U.S.C. 1988 (Supp. III 1991) provides in pertinent part:

> In any action or proceeding to enforce a provision of section 1981, 1981a, 1982, 1983, 1985, and 1986 of this title * * * , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

NORTH CAROLINA GENERAL STATUTES (1990)

§ 115C-116. Notice of decisions; mediation, administrative review, and judicial review of disagreements.

* * *

(d) Administrative Review. – Except as otherwise provided in this section, the administrative review shall be initiated and conducted in accordance with Article 3 of Chapter 150B of the General Statutes, the Administrative Procedure Act.

* * *

(h) Decision of the Administration Law Judge. – Following the hearing, the administrative law judge shall make a decision regarding the issues set forth in subsection (c). The decision shall contain findings of fact and conclusions of law. Notwithstanding the provisions of Chapter 150B of the General Statutes, the decision of the administrative law judge becomes final and not subject to further review unless appealed to the Review Officer as provided in subsection (i). A copy of the administrative

law judge's decision shall be served upon each party and a copy shall be furnished to the attorneys of record. The written notice shall contain a statement informing the parties of the availability of appeal and the 30-day limitations period for appeal as set forth in subsection (i).

* * *

(j) Power to Enforce Final Decision. – The State Board shall have the power to enforce the final decision of the administrative law judge, if not appealed pursuant to subsection (i), or the final decision of the Review Officer, by ordering a local educational agency:

(1) To provide a child with appropriate education;

(2) To place a child in a private school that is approved to provide special education and that can provide the child an appropriate education; or

(3) To reimburse parents for reasonable private school placement costs in accordance with the provisions of G.S. 115C-115 [sic] when it is determined that the local educational agency did not offer or provide the child with appropriate education and the private school in which the parent, guardian, or surrogate parent placed the child was an approved school and did provide the child an appropriate education.

* * *

NORTH CAROLINA SESSION LAWS
(July 8, 1988)

H.B. 364 **CHAPTER 1079**

AN ACT TO SIMPLIFY AND EXPEDITE THE PROCESS FOR REVIEWING DECISIONS REGARDING EXCEPTIONAL CHILDREN AND TO PROVIDE FOR MEDIATION OF DISAGREEMENTS.

The General Assembly of North Carolina enacts:

Section 1. G.S. 115C-116 is rewritten to read as follows:

* * *

(d) Administrative Review. – Except as otherwise provided in this section, the administrative review shall be initiated and conducted in accordance with Article 3 of Chapter 150B of the General Statutes, the Administrative Procedure Act.

* * *

(h) Recommended Decision. – Following the hearing, the administrative law judge shall make a recommended decision to the State Board of Education. The recommended decision shall conform to and be prepared in accordance with G.S. 150B-34.

(i) Final Decision by the State Board of Education. – The final decision shall be made by the State Board of Education in accordance with G.S. 150B-36. In its discretion, the State Board may appoint a panel of at least two members of the Board to make the final decision for and on its behalf in accordance with G.S. 150B-36, and if the

Board elects to exercise its discretion the decision of the panel shall be the final decision.

(j) Power to Enforce Final Decision. – The State Board shall have the power to enforce its final decision by ordering a local educational agency:

(1) To provide a child with an appropriate education;

(2) To place a child in a private school that is approved to provide special education and that can provide the child an appropriate education; or

(3) To reimburse parents for reasonable private school placement costs in accordance with the provisions of G.S. 115C-115 in the event it determines that the local educational agency did not offer or provide the child with appropriate education and the private school in which the parent, guardian, or surrogate parent placed the child was an approved school and did provide the child an appropriate education.

* * *

Supreme Court, U.S.
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No. 94-227

In The
Supreme Court of the United States
October Term, 1994

S-1 AND S-2, *et al.*,
Petitioners,

v.

STATE BOARD OF EDUCATION OF
NORTH CAROLINA, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court of Appeals
For the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether petitioners qualified as prevailing parties entitled to attorney's fees on the theory that their dismissed lawsuit had continuing catalytic force and was the cause of post-dismissal events which were of no direct benefit to them?

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---

BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fourth Circuit's *en banc* opinion in this case. That opinion is reported at 21 F.3d 49 (1994).

STATEMENT OF THE CASE

This unusual case has a long and complex history. In the beginning, the issue in controversy was whether in enacting the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.*, Congress intended to

require the states to vest final administrative authority to order reimbursement for private school costs in administrative hearing officers and, if so, whether Congress had that power. That issue was never resolved; it was declared moot by the Court of Appeals in November, 1987. *S-1 v. Spangler*, 832 F.2d 294 (4th Cir. 1987). Now, the issue is whether petitioners, who never obtained an enforceable judgment, consent order or settlement agreement, are nevertheless prevailing parties entitled to attorney's fees based on a letter written to the State of Vermont by the Office of Special Education and Rehabilitation Services (OSERS) in the United States Department of Education (USDOE) or based on post-mootness legislation enacted by the North Carolina General Assembly.

The events upon which petitioners claim prevailing party status are best described chronologically.

Todd and Lisa Y. enrolled in public schools operated by the Asheboro City Board of Education in August, 1979. They remained enrolled in the public schools on a full-time basis through the 1980-81, 1981-82, and 1982-83 school years. For the 1983-84 school year, Todd and Lisa were enrolled half-time in the public schools and half-time in a private school. The private school costs were paid by their parents. Following the 1983-84 school year Todd and Lisa's parents re-enrolled their children full-time in the public schools but demanded that the Asheboro City Board of Education reimburse them for the costs they had incurred by enrolling Todd and Lisa half-time in private school. The Asheboro City Board of Education rejected the parents'

demand and pursuant to state law then in effect appointed a hearing officer, C.D. Heidgerd, to consider the parents' demand. Mr. Heidgerd advised the parents that he did not have the power to grant them the relief they demanded, that is, reimbursement for the private school costs they had incurred.

On March 28, 1985, Todd and Lisa's parents petitioned the State Board of Education to amend or interpret its rules to grant hearing officers the power to order local school boards to reimburse the parents of handicapped children for private school costs. The State Board initially declined the parents' request on the grounds that the legal question underlying their request, whether the IDEA requires school systems to reimburse parents for private school costs, was pending in the United States Supreme Court for decision. On April 29, 1985, in *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359 (1985), this Court held that the right to a free, appropriate education, under some circumstances, encompasses the right to reimbursement for private school costs and that 20 U.S.C. § 1415(e)(2) gives the courts the power to order reimbursement. The issue of whether the IDEA requires the states to confer that power on hearing officers, however, was not addressed.

On May 1, 1985, Todd and Lisa's parents renewed their request to the State Board to amend or interpret its rules to confer on hearing officers the power to order local school boards to reimburse parents for private school costs. On June 5, 1985, the State Board denied their request on three grounds: (1) that State law did not authorize hearing officers

to order the payment of damages in the form of reimbursement and the federal law did not require that hearing officers have that power; (2) that any power the State Board itself might have to order judicial or quasi-judicial remedies, like reimbursement, could not be delegated to a hearing officer absent legislative authorization; and (3) that as a matter of public policy it ought not confer on hearing officers over whom it had no control the power to order the expenditure of public funds.

On August 2, 1985, Todd and Lisa Y. (as S-1 and S-2) by and through their parents (as P-1 and P-2) (hereinafter "petitioners") sued the Asheboro City Board of Education for reimbursement of the private school costs they had incurred during the 1983-84 school year and sued the State Board of Education to enjoin it to confer the power on hearing officers to order local school boards to reimburse parents for private school costs. On December 31, 1986, the District Court granted summary judgment to the petitioners on their claim against the State Board and enjoined the State Board to cease interpreting state law not to allow hearing officers to order reimbursement. The State Board appealed. During the pendency of the appeal, OSERS advised Vermont that the IDEA "requires states to authorize hearing officers to decide reimbursement." *See* Petitioners' Appendix pp. 49a - 54a. The District Court's opinion was cited as consistent with this advice. Also, during the pendency of the appeal, the Asheboro City Board of Education and the petitioners settled their claim for reimbursement. On November 4, 1987, the Court of Appeals, *ex mero motu*, held that the settlement of the underlying claim for reimbursement mooted the State

Board's appeal and vacated the district court's order. In part, that decision was based on "the difficulty and sensitivity of the constitutional issue at the core of this controversy. . . ." 832 F.2d at 298. This matter, however, was remanded to the District Court for determination of the petitioners' entitlement, if any, to attorney's fees.

On July 8, 1988, the North Carolina General Assembly amended the administrative procedures for processing complaints by the parents of handicapped children set out in N.C. GEN. STAT. § 115C-116. 1987 N.C. Sess. Laws, c. 1079 (1988 Sess.). *See* Petitioners' Appendix pp. 57a - 58a. Reflecting the State Board's concern that independent hearing officers ought not have final administrative authority to order reimbursement or other relief, these amendments authorized administrative hearing officers to make a recommended decision to the State Board and authorized the State Board to make the final administrative decision. Also reflecting the *Burlington* decision, these amendments specifically authorized the State Board to order relief to parents in the form of reimbursement for private school costs, where appropriate. No authority was given to hearing officers to order any relief.

Approximately one month later (August 23, 1988), the parents petitioned the District Court for attorney's fees. They found no solace in the General Assembly's recent amendment to N.C. GEN. STAT. § 115C-116 and observed in their petition for fees that the "continuation of litigation was necessary."

In the spring of 1989, USDOE voiced objections to the General Assembly's 1988 amendment to N.C. GEN. STAT. § 115C-116 and threatened to cut off some $50 million in federal funds to North Carolina for the education of handicapped children beginning with 1990 fiscal year. USDOE's principal objection was to the General Assembly's decision to place final administrative authority in the State Board rather than in some hearing officer independent of the State Board. The State Board urged USDOE to defer any decision pending this Court's decision in a case from Pennsylvania concerning a challenge to administrative procedures similar to North Carolina's and in which North Carolina had filed an *amicus* brief supporting Pennsylvania. That case, *Dellmuth v. Muth*, 491 U.S. 223 (1989), was decided on June 15, 1989. The sole grounds for the decision was the Eleventh Amendment. Thus, the lawfulness of Pennsylvania's procedure was not reached.

After an exchange of letters with the State Board, USDOE agreed to give North Carolina until July 1, 1990 to demonstrate that its decision to confer final decision making authority on the State Board was lawful before terminating funds. On February 10, 1990, the State Board, pursuant to 5 U.S.C. § 554(e), petitioned USDOE for a declaratory ruling on this issue. USDOE declined to issue a ruling.

Faced with the potential loss of $50 million in federal funds in the midst of a budget crisis, the General Assembly, on July 28, 1990, again amended the administrative hearings process set out in N.C. GEN. STAT. § 115C-116. The title to the act reads: "An Act to Amend the Exceptional

Children's Appeals Process, to Preserve Federal Funds, and to Save the State Replacement Funds." 1989 N.C. Sess. Laws, c. 1058 (1990 Sess.). Under these amendments, final administrative authority on appeal from the recommended decisions of hearing officers was transferred from the State Board to a Review Officer. The power to enforce final administrative orders, however, remained with the State Board. *See* Petitioners' Appendix pp. 55a - 56a.

On April 2, 1991, the parties filed stipulations for purposes of adjudication of the plaintiffs' request for attorney's fees. These stipulations described the petitioners' claims against the State Board, summarized the General Assembly's amendments to the administrative hearing processes and provided a chronology. By order dated March 30, 1992, the District Court found that the petitioners were prevailing parties entitled to fees because "by virtue of [their] complaint sufficient federal pressure was brought on the State of North Carolina that Section 115C-116 was amended to comply with federal law." (Petitioners' Appendix p. 45a). A panel of the Court of Appeals for the Fourth Circuit affirmed the District Court by a divided vote reasoning that the 1986 District Court opinion "must have alerted OSERS to the State's non-complying position" and "played a major causative role in the [1987] OSERS Letter Ruling and thereby the Department of Education's [1989] policy position." *S-1 by and Through P-1 v. State Bd. of Educ.*, 6 F.3d 160, 165 (1993). The panel opinion was subsequently vacated by the Court of Appeals sitting *en banc* and the District Court decision awarding attorney's fees to petitioners was reversed.

REASON WHY THE WRIT SHOULD NOT BE GRANTED

This is not a proper case for allowing the writ of certiorari. The Court of Appeals sitting *en banc* held that petitioners had failed to achieve prevailing party status because a vacated judgment cannot serve as a catalyst for post-litigation events. While there may be some disagreement among the courts of appeal about the viability of the catalyst theory in light of *Farrar v. Hobby*, ___ U.S. ___, 113 S. Ct. 566 (1992), petitioners have failed to identify any disagreement among the courts of appeal about the continuing catalytic force of a dismissed lawsuit. Moreover, petitioners' claim to prevailing party status is foreclosed by this Court's holdings that the relief which forms the basis for a plaintiffs' claim to prevailing party status must directly benefit them at the time they obtained it.

Petitioners' argument that the Court should grant their writ because the Court of Appeals' decision "dramatically narrows the grounds for fee awards" is simply not well-founded. The Court of Appeals' decision in this unusual case is sound, logical and consistent with this Court's decisions.

I. THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY HELD THAT THE CATALYST THEORY IS NOT SO BROAD AND EXPANSIVE AS TO PERMIT PETITIONERS TO OBTAIN PREVAILING PARTY STATUS BASED ON EVENTS OCCURRING AFTER DISMISSAL OF THEIR LAWSUIT ON THE GROUNDS OF MOOTNESS.

Petitioners argued to the Court of Appeals that the catalyst theory is so broad and expansive that they can obtain attorney's fees from respondents based on decisions made by the North Carolina General Assembly almost three years after their lawsuit was declared moot and the judgment in their favor vacated. The Court of Appeals sitting *en banc* rejected petitioners' argument and held, in light of *Farrar v. Hobby*, 113 S. Ct. 566, that "dismissal on appeal of an action under 42 U.S.C. § 1983 for prudential reasons as moot operates to vacate the judgment below [citation omitted], and prevents the plaintiffs from being found prevailing parties by virtue of post-dismissal events." *S-1 and S-2 v. State Bd. of Educ. of N.C.*, 21 F.3d 49, 51 (1994).

The logic of this simple proposition is clear. As Judge Wilkinson stated in his dissent from the panel opinion, subsequently adopted by the *en banc* majority:

> Plaintiffs' lawsuit lost whatever force it had as a catalyst the day it was mooted by this court. I do not understand how moot lawsuits, in which the possibility of relief against a party

> is by definition foreclosed, continues nonetheless to function as [a] catalyst for change and for the recovery of attorney's fees.

6 F.3d at 169-170.

The value of this logical principle as a limit on the amorphous catalytic theory is demonstrated by the facts of this case. Allowing petitioners' claim for attorney's fees to be pursued based on the supposed continuing catalytic force of their mooted lawsuit would, as Judge Wilkinson observed, expose respondents to liability for fees and at the same time deny respondents "their right to an appeal" and "the opportunity to refute the claims asserted against them."[1] 6 F.3d at

---

[1] The fundamental claim petitioners' asserted against respondents was that the IDEA requires North Carolina to vest final administrative authority to resolve the complaints of handicapped parents in administrative hearing officers rather than in the State Board of Education, a constitutional agency given the power by the Constitution "to supervise and administer the free public school system." N.C. Const. art. II, § 5. Petitioners' claim is at odds with the express intention of Congress in establishing USDOE "to protect the rights of State and local governments . . . in the areas of educational policies and administration of programs and to strengthen and improve the control of such governments . . . over their own educational programs and policies." 20 U.S.C. § 3403(a). Petitioners' claim is also flatly contrary to rules of statutory construction rooted in principles of federalism. *See, e.g., Penn. Dairies v. Milk Control Comm'n*, 318 U.S. 261, 275 (1943) (intention of Congress (continued...)

169. There is, moreover, no reasonably ascertainable limit on the period of time a mooted lawsuit would continue to have catalytic force or any clear measure of the level of catalytic force a mooted lawsuit must have. Does a mooted lawsuit continue to have catalytic force for one year, two years or even three years? Must a plaintiff seeking fees based on events occurring after his lawsuit is mooted prove that his mooted suit was the sole cause of the post-litigation events, or only that his lawsuit was a contributing cause? Here, petitioners seek to hold respondents liable for attorney's fees based on legislation enacted by the North Carolina General Assembly almost three years after their claim was declared moot and they seek to hold respondents liable for attorney's fees based on legislation enacted by the North Carolina General Assembly in response to a threat by USDOE to terminate $50 million in federal funding for the education of handicapped children.

In the face of these facts, petitioners contend that the Court ought to grant their petition because the Court of Appeals' decision "dramatically narrows the grounds for fee awards," Petition p. 11, and is in conflict with the decisions of other courts of appeal. *Id.* pp. 19-22. This claim is not well-founded. None of the "conflicting" decisions cited by

---

[1](...continued)
to regulate internal affairs of a state "is not lightly to be inferred and ought not to be implied"); *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991) (Congressional intention to upset balance of power between federal and state governments must be "clear and manifest").

petitioners, and no other decision to respondents' knowledge, holds that a dismissed lawsuit has any continuing catalytic force or that post-litigation events are a sufficient basis for claiming prevailing party status. Indeed, in every case cited by petitioners the lawsuit alleged to have catalytic force was pending at the time the actions were taken by defendants which allegedly gave the plaintiffs the "relief" they sought.

In short, the decision here does not dramatically narrow the grounds for fee awards and is not in conflict with the decisions of other courts of appeal.

II. REGARDLESS OF THE CONTINUED VIABILITY OF THE CATALYST THEORY, PETITIONERS' CLAIM FOR ATTORNEY'S FEES IS FORECLOSED BY DECISIONS OF THIS COURT.

In *Farrar*, 113 S. Ct. at 573, this Court held: "Whatever relief the plaintiff secures must *directly* benefit him *at the time* of the judgment or settlement." (emphasis added) *Hewitt v. Helms*, 482 U.S. 755, 764 (1987) is cited in *Farrar* in support of this requirement. *Hewitt* establishes that this requirement applies when a plaintiff seeks attorney's fees under a catalyst theory -- assuming that theory is viable -- for relief obtained other than by a judgment, consent decree, or settlement. *Hewitt* also illustrates plaintiffs' failure to meet this requirement.

In *Hewitt*, the plaintiff, a prisoner, relied on a catalyst theory to claim prevailing party status based on an amendment to defendants' regulations which was made after his

release from prison, but during the pendency of his appeal on the merits to the Court of Appeals from an adverse decision by the District Court. 482 U.S. at 758-59. The Court rejected the plaintiffs' claim for attorney's fees without deciding whether the catalyst theory is viable. *Id.* at 763 ("We need not decide the circumstances, if any, under which this 'catalyst' theory could justify a fee award under § 1988 . . ."). The claim for fees was rejected because *Helms* "did not and could not get redress" from promulgation of the amendment to the regulations. *Id.* When the amendment to the regulations was made, "Helms had long since been released from prison." *Id.* By the time of the Supreme Court's decision, Helms had returned to prison and was presumably benefiting from the new regulations in some indirect manner. Nevertheless, "that fortuity" did not "render him, retroactively, 'a prevailing party'" in his lawsuit. *Id.* at 764. Thus, in *Farrar's* words, the amendment to the regulations did not "directly benefit" Helms "at the time" of the amendment, and therefore did not provide any basis for him to obtain prevailing party status.

And so it is with petitioners. The relief petitioners sought against respondents was a change in the State Board's rules to allow hearing officers to award reimbursement for private school costs. They claim they obtained that relief through 1988 and 1990 amendments by the General Assembly to the administrative procedures for reviewing complaints by parents of handicapped children. Assuming they obtained that relief through either the 1988 or 1990 statutory amendments, that relief did not directly benefit them at the time they obtained it, *i.e.*, in 1988 or 1990. By virtue of the

1987 settlement agreement between petitioners and the local defendants, the petitioners obtained full reimbursement for the private school costs they had incurred. Thereafter, they had no direct or immediate interest in the scope of powers of hearing officers. Their interest, at most, was indirect and conjectural, arising only in the event that at some point in the future they again decided unilaterally to place their children in some private school, they again decided to seek reimbursement for those costs and they again decided to seek administrative review of a decision by the local school board to deny reimbursement.

CONCLUSION

The Court of Appeals' decision is sound, logical and entirely consistent with the decisions of this Court; it is not in conflict with the decisions of other courts of appeal. Respondents therefore request the Court to deny the petition.

Respectfully submitted,

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Respondents' Brief in Opposition fails to come to grips with the principal contention in the Petition: that there is a split in authority as to whether this Court's decision in *Farrar v. Hobby*, 113 S. Ct. 566 (1992), overruled, *sub silentio*, more than a decade of law in virtually every federal circuit allowing an award of attorney's fee under a catalyst theory of recovery. The court of appeals below, in a 7-6 *en banc* ruling, held that *Farrar* had precisely that effect, contrary to every other circuit to have reached the question. As we now show, respondents' Opposition does not seriously question the split in authority over this important issue, and review should be granted.

1. Respondents claim that review should be denied on the ground that, even under a catalyst theory, petitioners would not be entitled to a fee. In short, respondents assert that the Fourth Circuit's holding may be read to apply only to cases in which the benefit catalyzed by the suit occurred after the suit had been held to be moot. However, the question whether a suit deemed moot for prudential reasons, as was this case, can act as a catalyst is a factual inquiry that has already been resolved favorably to petitioners by the district court (Pet. App. 44a-45a), and although questioned briefly in Judge Wilkinson's panel dissent (Pet. App. 30a), was not the basis of the *en banc* ruling. That ruling held that *Farrar* had interred the catalyst approach (Pet. App. 5a) and, by adopting Judge Wilkinson's panel dissent (*see* Pet. App. 28a n.2), noted that Fourth Circuit was parting company with other circuit courts on that question.

Petitioners' district court victory against all defendants -- including respondents here -- was prominently mentioned in a Letter Ruling issued by the United States Department of Education's Office of Special Education and Rehabilitation Services ("OSERS"), which specifically embraced petitioners' view of the law (Pet. App. 53a). The district court found that the OSERS Letter Ruling began a chain of events leading to changes in North Carolina law that fully vindicated petitioners' position (Pet. App. 44a), entitling them to an award of fees against respondents.

Thus, respondents' principal argument -- that the Fourth Circuit's decision applies to a narrow category of cases "and is not in conflict with the decisions of other courts of appeal" (Opp. 12) -- is plainly at odds with the ruling below. Moreover, if there were any question that the Fourth Circuit's *en banc* ruling rejected outright the catalyst theory, that question is now foreclosed by the Fourth Circuit's recent decision in *Arvinger v. Mayor & City Council of Baltimore*, ___ F.3d ___, 1994 U.S. App. Lexis 19693, at *18-*20 (4th Cir. Aug. 1, 1994), where the plaintiff sought fees on the ground that his suit had catalyzed a benefit received from the

defendant *prior to* dismissal of the suit. The court of appeals reversed the fee award in specific reliance on the decision below, which it read as broadly rejecting the catalyst theory. *See also id.* at *21 (Restani, J., concurring)(disagrees that *Farrar* rejected catalyst approach, but bound to reverse fee award because of *en banc* decision in *S-1*).*

2. Relying on *Hewitt v. Helms*, 482 U.S. 755 (1987), respondents maintain that the result below can be defended on the ground that petitioners did not benefit from the modifications in North Carolina law that their suit had induced. As we explained in the Petition (at 14 n.2), petitioners achieved a direct benefit from the changes in law. Unlike the situation of the prisoner in *Hewitt v. Helms*, the local school officials here, with whom petitioners maintained an ongoing relationship, were placed under a continuing obligation to provide a lawful due process hearing to petitioners in the future. Thus, absent the Fourth Circuit's wholesale renunciation of the catalyst theory, petitioners would be entitled to a fee award for the concrete benefit they obtained from their suit against respondents.

CONCLUSION

For the reasons stated above and in the Petition, the petition for a writ of certiorari should be granted.

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* In addition, we note that two other circuits have recently rejected the Fourth Circuit's reasoning, which those courts viewed as a general repudiation of the catalyst theory. *See Zinn v. Shalala*, ___ F.3d ___, 1994 U.S. App. Lexis 24100, at *6-*8 (7th Cir. Sept. 2, 1994)(specifically rejecting the decision below); *Beard v. Teska*, ___ F.3d ___, 1994 U.S. App. Lexis 19142, at *25-*26 (10th Cir. July 26, 1994)(same); *see also Little Rock School Dist. v. Pulaski County Special School Dist., No. 1*, 17 F.3d 260, 263 n.2 (8th Cir. 1994).

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